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ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

BACKGROUND PAPERS & REPORTS

VOLUME 1

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ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

BACKGROUND PAPERS AND REPORTS

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Government Publications

PREFACE

The Ontario Advisory Committee on Confederation - A View from the Chair

> "Federal and provincial governments were not thought of as competing units, almost sworn enemies, but as complementary institutions all engaged in their allotted tasks for the benefit of the whole people of Canada."[1]

Such is the opinion of Professor Frank Scott on the aims of the Fathers of Confederation. Although the dramatis personae and the scenario have proceeded through sets of swift change in one hundred years, this objective remains undisturbed. Division of authority is both the Achilles' heel as well as the peculiar strength of a federal system of government. The genius of our own Confederation has been its capacity, through war and peace, to adopt its form and functions to ensure that "the benefit of the whole people of Canada" would remain as the undisputed goal.

Today, one hundred years after Confederation, the forces of electronic technology, the impact of demographic change, and the transformation of public expectations are all combining to force institutions to accept change at an unprecedented rate.

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1. Presidential address to the Royal Society of Canada, 1961. Reprinted in "The Courts and the Canadian Constitution", ed. W. R. Lederman.

It seems the more important then, as Professor Scott has suggested, that changes in our federal system be made consciously and deliberately in full awareness of all that we are and have been.

Such has been the approach of the Ontario Advisory Committee on Confederation. As a body of eminent public figures, it contains a profound awareness of and respect for the fundamental values of the Canadian Confederation. As a group of distinctive individuals, it reflects all the subtlety and complexity of the issues which we face. Yet, all the members are deeply committed to the abiding objective of a strong federal system. In recognition of the responsibility that the Province of Ontario bears in contributing to a strong Canada, the members of this Committee have grappled for two years with many of the issues confronting Ontario and Canada.

However complex the technical difficulties, I suspect that one proposition would be readily agreed to by all our members: such difficulties will be surmounted through the willingness of all partners to construct a workable federal system of government, in the spirit of 1867. Accordingly, the Committee is as concerned with strengthening the will as lighting the way. Although the following studies deal essentially with technical matters, the Committee has devoted much of its time to the broader question of goals. The flavour of that process is more difficult to capture in the printed word or in a set of reports. However, a complete view of the work of the Committee would reveal a concern for both ends and means, an awareness of the need for aspiration as well as implementation, and the recognition of the value of faith along with facts.

When the Ontario Advisory Committee on Confederation was established in February, 1965, it was not conceived as a body which would be working towards the preparation of a comprehensive final report, a fact which is sufficient these days to confer uniqueness on the Committee. Rather, it was established to advise the Prime Minister of Ontario on questions affecting Ontario's role in Confederation. This is certainly the function the members of the Advisory Committee have seen for themselves. This role has been performed through a number of meetings between the Advisory Committee, the Prime Minister, and members of the Cabinet Committee on Confederation. At these meetings, a number of short-run and long-run questions relating to federal-provincial negotiations, potential independent action by Ontario on French-English questions, and possible changes in constitutional practice or form have been discussed.

Most of the members of the Advisory Committee have taken an active part in public discussion of matters relating to the work of the Committee. Many of them have strong and distinctive views well-known to the public. The Prime Minister has made clear that membership on the Committee is not to interfere with any member's right to speak or write publicly on any of the issues confronting the Committee. Since these public views are known to represent a wide spectrum of opinion, it can be understood that the preparation of reports reflecting an agreed Committee position is not necessarily desirable nor even in many instances possible.

Given these circumstances, these reports and studies represent only a sampling of the Committee's work. No single report could adequately express its usefulness or portray the atmosphere and spirit of its deliberations. This collection of papers combines some of the reports which have been prepared for the Committee, either by Committee members themselves, or by commission. Most of the papers are technical in nature and relate only to a specific question. Although they are neither comprehensive nor completely representative of the work and views of the Committee, they will make a significant contribution to the literature and body of knowledge of Canadian federalism. Each of the papers express only the author's point of view, with the exception of the report on economic and fiscal matters.

Much of the Committee's work has been conducted through the medium of three sub-committees: one dealing with constitutional questions, a second with economic and fiscal problems, and a third with items that might broadly fit into the cultural sphere. Most of the papers published here relate to the work of the Constitutional Sub-Committee which has concentrated most of its time on specific questions such as the method of amending the constitution, the role and structure of the Supreme Court of Canada, the role of a province in international relations, and the proposals which have been made for changes in the Canadian Senate and second chambers in other countries. In reviewing and assessing these questions, the Sub-Committee has

had intensive discussions about the need for constitutional change and about matters which would require attention in such a process.

The Economic and Fiscal Sub-Committee, which is represented in this collection of papers by a report that it prepared in the spring of 1966 prior to the final round of federal-provincial discussions within the Tax Structure Committee, has concentrated on performing an advisory role in the development of Ontario's position in such discussions. By no means all of the Sub-Committee's recommendations were adopted by the government in its formal presentations at the federal-provincial meetings in the autumn of 1966, but they did perform a valuable service in the preparation of the government's position. Since this Sub-Committee contains members of both the federal Royal Commission on Taxation and the Ontario Committee on Taxation, it is also in a position to perform a valuable role in the consideration of these important reports on taxation.

Because of its wide range of interest, the Cultural Sub-Committee has held a number of additional meetings on matters within its general scope. The only report among these papers related directly to the Sub-Committee's work is by one of its members, President Symons of Trent University, on a cultural exchange program. This report, together with other material prepared by the Sub-Committee relating more directly to educational exchanges, formed the basis for the establishment last year by the Government of Ontario, of a cultural and

educational exchange program, administered by the Department of Education. The Sub-Committee, which assisted in the appointment of the Director of the program, has met with the Director to discuss projects which could be carried out within the framework of the program. The Sub-Committee has also done considerable work on the important question of French language education in Ontario both for English-speaking and French-speaking students. It has also discussed the use of French in Ontario in other activities such as the judicial system, local government, and departments and agencies of the Ontario government, including the possibility of creating bilingual districts within Ontario.

Some of the papers relate to questions which have been dealt with by the Committee as a whole. Included among these are the report on a possible federal capital territory for the Ottawa-Hull region prepared for the Committee by Professor Donald Rowat of Carleton University. The paper with the most general theme in this collection is the one entitled "The Modern Federation" prepared by one of the Committee members, Dr. Alexander Brady, in the spring of 1966. This paper generated a wide-ranging discussion by the Committee on the broad question: where is the Canadian federation heading? This question has been discussed further at subsequent meetings and is the central issue that could well be considered at a "Confederation of Tomorrow Conference".

With the exception of the summer months, the Committee

as a whole has met once a month from March, 1965. One of its original members, Mr. Justice Laskin, resigned from the Committee on his appointment to the Bench in the summer of 1965. Another of the Committee members, Father Matte, President of the University of Sudbury, has been seriously ill and unfortunately unable to take part in the Committee's deliberations for most of the last year.

In conclusion, may I express my appreciation for the rare privilege of serving as Chairman of a group as energetic and dedicated as the Ontario Advisory Committee on Confederation. I am also conscious, along with all the members of the Committee, of the contribution of our Co-secretaries, Mr. D. W. Stevenson and Mr. R. A. Farrell, and the staff of the Federal-Provincial Affairs Secretariat. Finally, I would add a word of gratitude to the Administration Branch of the Department of Economics and Development, not only for continuing support, but more particularly for a Herculean effort in printing the first three volumes of the work of the Ontario Advisory Committee on Confederation.

H. Ian Macdonald
Chairman
Ontario Advisory Committee
on Confederation

MEMBERS OF THE

ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

Chairman

H.I. Macdonald,
Chief Economist for the Province of Ontario,
Former Member of the Department of Political Economy,
University of Toronto.

Members

Professor Alexander Brady,
Department of Political Economy,
University of Toronto.
Author of Democracy in the Dominions and other works.
Adviser to the Attorney General of Ontario on
constitutional problems.

Professor John Conway,
Department of Humanities and Master of Founder's College,
York University.
Formerly Professor of History at Harvard University.

Professor D.G. Creighton,
Department of History,
University of Toronto.
Author of a two-volume study on Sir John A. Macdonald,
as well as other books and articles. His most recent
study is The Road to Confederation.

Dean Richard M. Dillion,
Faculty of Engineering Science,
University of Western Ontario.
Formerly Colombo Plan consultant on engineering
education to the Government of Thailand.

Dr. Eugene Forsey,
Director of Special Studies for the
Canadian Labour Congress.
Authority on Canadian constitutional problems.
Author of The Royal Power of Dissolution of Parliament
in the British Commonwealth as well as numerous articles.

Professor Paul W. Fox,
Department of Political Economy,
University of Toronto.
Member of the Advisory Committee on Research to the Royal Commission on Bilingualism and Biculturalism.
Editor of the Canadian Commentator 1961-64.
Editor of Politics: Canada.

George E. Gathercole,
Chairman of the Hydro-Electric Power Commission of Ontario.
Formerly Deputy Minister of Economics and Development in Ontario.

Mr. Justice Bora Laskin,
Judge of the Ontario Court of Appeals.
Formerly Professor of Law, University of Toronto.
Author of Canadian Constitutional Law as well as many articles.

Dean W.R. Lederman,
Faculty of Law,
Queen's University.
Editor of The Courts and the Canadian Constitution.

Clifford R. Magone, Q.C.
Formerly Deputy Attorney General for Ontario.
Adviser to the Ontario Government on constitutional matters.

Rev. Dr. Lucien Matte, S.J.,
President of the University of Sudbury.
Formerly the first President of the University College of Addis Ababa, Ethiopia.

Professor John Meisel,
Department of Political Studies,
Queen's University.
Author of The Canadian General Election of 1957, and editor of the Election Papers 1962.
Member of the Advisory Committee on Research to the Royal Commission on Bilingualism and Biculturalism.

Professor R. Craig McIvor,
Chairman of the Department of Economics,
McMaster University.
Author of Canadian Monetary, Banking and Fiscal Development.
Member of the Ontario Committee on Taxation (Smith Committee)

Professor Edward McWhinney,
Director of the Institute of Air and Space Law,
McGill University.
Author of Judicial Review in the English Speaking World;
Comparative Federalism: States' Rights and National Power;
Constitutionalism in Germany and the Federal
Constitutional Court.

J. Harvey Perry,
Executive Director of the Canadian Bankers' Association.
Author of Taxation in Canada; Taxes, Tariffs and Subsidies;
Financing the Canadian Federation.
Member of the Royal Commission on Taxation (Carter Commissio

Roger N. Seguin, Q.C.,
President of L'Association Canadienne-francaise
d'Education d'Ontario.
Member of the Bar in both Quebec and Ontario.

Professor T.H.B. Symons,
President and Vice-Chancellor,
Trent University.

ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

TERMS OF REFERENCE

WHEREAS the Government is concerned with the position of Ontario within the framework of Confederation;

AND WHEREAS the relationship between the Provinces and between the Provinces and the Federal Government has undergone great changes since Confederation;

AND WHEREAS the Government is desirous of seeking continuing advice in all matters which will assist it in performing its part in maintaining and strengthening the unity of Canada.

THEREFOR

(a) A committee to be known as the Ontario Advisory Committee on Confederation will be appointed, hereinafter called the Committee,

(b) the objects of the Committee shall be to advise the Government with respect to:

  (i) matters in relation to and arising out of the position of Ontario in Confederation,

  (ii) the present and future Constitutional requirements of Ontario considered both independently of and in relation to the Constitutional changes and amendments which have been established or are being studied by any Province or by the Federal Government,

  (iii) such specific matters and questions arising from the aforesaid as the Government may from time to time refer to the Committee.

Parliament Buildings,
Toronto, Ontario.
January 5, 1965.

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Volume II

Volume III

Brief Notes on the Papers

These notes are not intended to summarize the content of each paper, but are an attempt to provide a guide to the area covered.

Volume I

A. THE LEGISLATURES AND EXECUTIVES OF THE FEDERATION, by Eugene Forsey, October, 1966.

The paper discusses in Dr. Forsey's own distinctive style the effect of the following problem areas on representation in the federal and Quebec legislatures and on the constitution: (1) Quebec's opting out of federal-provincial shared-cost programs, (2) the possibility of Quebec's opting out of the federal family allowance plan, (3) the official demand of the Quebec governmentat that the federal government should, in Quebec, withdraw from the payment of flat-rate old age security payments, (4) co-existence of the Canada and Quebec Pension Plans, (5) the endowment of the Senate with large new independent powers, (6) the proposal from various quarters in Quebec to transfer large fields of jurisdiction from the federal Parliament to the Quebec Legislature.

B. CONSTITUTIONAL MONARCHY AND THE PROVINCES,
by Eugene Forsey, October, 1965.

Some Canadians have an "amiable but fuzzy" desire to help the French Canadians by recommending that Canada become a republic. Dr. Forsey contends that a factual look at Canada's political and constitutional history indicates that this theory is a misconception. Moreover, he also disposes of six other arguments for a republic in Canada.

C. THE PROCESS OF CONSTITUTIONAL AMENDMENT FOR CANADA,
by W.R. Lederman, February, 1967.

"In June, 1966, the Lesage Government was defeated by the National Union Party of Daniel Johnson, which had been explicitly opposing the Fulton-Favreau formula. With the Johnson Government in power in Quebec, it is now clear that the Canadian Constitution is open for review once more." Dean Lederman discusses the methods of constitutional change as they now confront us, the question of whether the federal constitution should be repatriated and the terms on which the repatriated constitution could then be amended.

D. THE MAKING OF FEDERAL CONSTITUTIONS:
A STUDY OF CONSTITUTION-MAKING PROCESSES IN THE
UNITED STATES, AUSTRALIA, INDIA, PAKISTAN,
MALAYSIA AND THE WEST INDIES,
by Alex Mesbur, Spring, 1965.

Mr. Alex Mesbur, a graduate of the University of Saskatchewan in Honours Politics and History, wrote this paper while a

law student at Queen's University under the direction of Dean W.R. Lederman.

The paper deals with constitution-making in federal states. Any attempt to draft a new constitution or to make serious amendments could involve an important shift in our approach to federalism. How are federal constitutions created? What has been the experience of other federal states? Mr. Mesbur's paper is a study of six aspects of the constitution-making processes in the United States, Australia, India, Pakistan, Malaysia, and the West Indies:

(a) The political and constitutional background to federal constitution-making.

(b) Constitution-making as an amendment process.

(c) The use of committees of inquiry and commissions and conferences in the period before final constitution-making.

(d) Creation of constitutions by legislation and order-in-council.

(e) The constituent assembly as a constitution-making device.

(f) The use of referenda and the ratification of constitutions.

E. THE PROVINCES AND INTERNATIONAL AGREEMENTS, by Bora Laskin, Spring, 1965.

The renewed interest on the part of certain provinces, particularly Quebec, to play a greater role in international affairs led the Committee to investigate more deeply provincial responsibility in this field. Sustained public interest in this topic occasioned two subsequent papers on the same general topic.

The purpose of Mr. Justice Laskin's paper is to establish on a legal basis the answers to three important questions:

(1) Do the provincial governments have any right to make agreements, treaties, and conventions with foreign powers?

(2) In what way (if any) is the federal government restricted in making agreements with foreign powers in areas of provincial legislative jurisdiction?

(3) Are provincial agents-general and provincial discussions and arrangements with foreign governments illegal?

F. THE CONSTITUTIONAL COMPETENCE WITHIN FEDERAL SYSTEMS AS TO INTERNATIONAL AGREEMENTS, by Edward McWhinney, January, 1967.

From examinations of a number of examples cited on behalf of the Province of Quebec, Professor McWhinney concludes that "on a practical level, a lot of the apparent problems raised by Quebec's tentative ventures into trans-national governmental and commercial operations are seen not really to exist at all."

G. TREATY-MAKING POWER IN CANADA, by R.J. Delisle, July, 1966.

Mr. R.J. Delisle worked for the Department of Economics and Development between February and July of 1966. Mr. Delisle graduated with his LL.B. from Queen's University in June of 1965. In the autumn of 1966, he enrolled as a graduate student at the University of Michigan.

Mr. Delisle's paper examines the problem of whether a province, as a constituent member of a federation, can enter into international agreements intended to create legal rights and obligations, or to establish relationships governed by international law. The report attempts to answer this question by looking first at what the writers "on International Law have said, then to examine the evolution of treaty-making power in Canada as seen in the custom and practice of the past century (at times formulated at Colonial and Imperial Conferences), and finally to be a review of judicial pronouncements on the subject."

H. A SUPREME COURT IN A BICULTURAL SOCIETY: THE FUTURE ROLE OF THE CANADIAN SUPREME COURT, by Edward McWhinney, Spring, 1965.

The function of our Supreme Court, a body appointed by the federal government, has come in for attack as to its impartial role in disputes between the provinces and the federal government. What kind of role should the Supreme Court play in a federal country? Professor McWhinney sets out to suggest an outline for restructuring the Supreme Court of Canada based on an analysis of the functioning of Continental European final appellate tribunals and on the experience of the Canadian Supreme Court in the 1950's and early 1960's.

I. MEMORANDUM ON THE ASSOCIATE STATES,
by Eugene Forsey, November, 1966.

Various proposals have been suggested to cure Canada's constitutional ills. One of these is the "associate state" concept put forth by the Saint Jean-Baptiste Society of Montreal to the Quebec Legislature's Committee on the Constitution, May 16, 1964. Although the idea of the associate state had been discussed before this date, the Society's presentation was one of the first popular expressions of support for it. Dr. Forsey's memorandum is mainly concerned with an analysis of this report.

Volume II

J. THE MODERN FEDERATION,
by Alexander Brady, April, 1966.

In this major paper Professor Brady analyzes the changes in the Canadian federation since 1945 and the present problems which confront us. These problems can be traced to various sources, but one of the major problems is a fresh strong French-Canadian nationalism. He concludes that an understanding of the subtlety and complexity of the French fact on the part of English-speaking leaders is more urgent than a new constitution. Furthermore, he feels that such understanding will establish a renewed partnership with French Canadians and thus add to the substance of Canadian federation.

K. THE PROPOSAL OF A FEDERAL CAPITAL TERRITORY FOR CANADA'S CAPITAL, by D.C. Rowat, September, 1966.

Many of the briefs to the Royal Commission on Bilingualism and Biculturalism advocated the creation of a federal district in which the bilingual-bicultural character of Canada would be symbolically reflected. As a result, the Committee decided to commission Professor D.C. Rowat of Carleton University to prepare a study for them on this question. Professor Rowat submitted his report to the Committee in September, 1966. The knowledge of the existence of such a report stimulated a great deal of further discussion and research on the problems of a capital district by the federal and Quebec governments and by citizens' groups in the Ottawa-Hull area.

Professor Rowat's report is a broadly based study in which the question of a federal district is approached from the point of view of three objectives:

(a) The effective implementation of the national capital plan; that is, a desirable development of the community through such means as a comprehensive zoning law and the establishment of a so-called green belt and reform of local administration.

(b) Development of Ottawa and Hull as an area symbolic of the nation rather than as mere regional centres in Ontario and Quebec.

(c) The creation of a truly bilingual environment in the Ottawa area which would make the capital an attractive place for French Canadians to work.

The report concludes that these objectives could be met by means of greater co-operation among the Ontario, Quebec, and federal governments. Since this co-operation cannot be assured, Professor Rowat feels that these objectives would more likely be achieved by the creation of a federal capital territory.

L. THE NATURE AND PROBLEMS OF A BILL OF RIGHTS, by W. R. Lederman, November, 1966.

Dean Lederman's deceptively simple thesis is that the demand for a Bill of Rights simply reflects the "age-old demand of citizens for justice". He concludes that the best constitutional guarantees of justice are those that "safeguard the democratic character of our legislative bodies, the high quality and independence of the courts, and the fairness of procedure in both".

M. THE PROVINCES AND THE PROTECTION OF CIVIL LIBERTIES IN CANADA: THE PROVINCE OF QUEBEC, by Edward McWhinney, February, 1967.

Many of the proposals advocating changes in the Canadian federal system have included suggestions for entrenching a Bill of Rights in the Constitution. This suggestion appears to have a great deal of support among a wide spectrum of reformers in the Province of Quebec. During the Quebec provincial election of 1966, both the major political parties included civil rights planks in their platforms.

Professor McWhinney's paper sets out the past position of civil liberties in Quebec and reviews the important changes that have occurred in the years of the Quiet Revolution. The paper illustrates the improvements that have been made as well as showing the areas in which progress is still required.

N. PROPOSALS FOR AN ONTARIO CULTURAL EXCHANGE PROGRAMME AND AN ONTARIO-QUEBEC CULTURAL EXCHANGE AGREEMENT, by T.H.B. Symons, July, 1965.

"There is an acute need for more and better communication between French- and English-speaking Canadians, and there is widespread agreement that a great deal could be done to achieve this improved communication through a programme of cultural exchanges sponsored by the Province of Ontario." Professor Symons' main recommendation is that the Province of Ontario ought to establish an extensive and sustained programme of cultural exchanges between Ontario and Quebec and within Ontario. It was Professor Symons' paper which ultimately led to the establishment of the Ontario Cultural Exchanges Program.

O. REPORT OF AN ONTARIO POSITION IN FEDERAL-PROVINCIAL FINANCIAL RELATIONS, by the Economic and Fiscal Sub-Committee, April 24, 1966.

With the approach of the quinquennial negotiation of federal-provincial financial arrangements, the government asked the Committee to make recommendations as to the stand that the Ontario Government should take on federal-provincial tax-sharing and cost-sharing arrangements and equalization payments.

Volume III

P. PROPOSALS FOR CHANGES IN THE CANADIAN FEDERAL SYSTEM - A SUMMARY, prepared by the Federal-Provincial Affairs Secretariat, Office of the Chief Economist, December, 1966.

This summary lists a wide variety of suggestions that have been made for changes in the Canadian federal system, ranging from minor adjustments to wholesale revisions.

Q. FRANCO-ONTARIAN POPULATION BY ETHNIC ORIGIN AND BY MOTHER TONGUE FOR EACH COUNTY OF THE PROVINCE - A TABLE, prepared by the Federal-Provincial Affairs Secretariat, Office of the Chief Economist, February, 1967.

This table has been prepared from D.B.S. statistics of the 1961 census. It contains data on the Franco-Ontarian population by ethnic origin and by mother tongue for each county and district of the province. The data also expresses the Franco-Ontarian population as a percentage of a county's total population. In addition, the figures and percentages are provided for the municipal sub-divisions of the counties and districts.

This data has been most useful to the members of the Committee in their discussions of possible bilingual districts in Ontario.

R. AN ANALYSIS OF BRIEFS SUBMITTED TO THE ROYAL COMMISSION ON BILINGUALISM AND BICULTURALISM FROM THE POINT OF THEIR RELEVANCE TO THE PROVINCE OF ONTARIO, by Elizabeth Way, Spring, 1965.

Miss Way is a Bachelor of Arts graduate from Queen's University and prepared this paper under the direction of Professor John Meisel.

This report is an analysis of certain briefs presented to the Royal Commission on Bilingualism and Biculturalism. It is divided into three parts which respectively analyze those briefs originating in Ontario, those originating in Quebec and some comments on those recommendations that could be implemented relatively easily and quickly.

The following two charts attempt to summarize the findings contained in Miss Way's analysis of briefs submitted to the Royal Commission on Bilingualism and Biculturalism (R.).

S. THE SUBSTANCE OF RECOMMENDATIONS IN THE FIELD OF EDUCATION TO THE ROYAL COMMISSION ON BILINGUALISM AND AND BICULTURALISM AS THEY PERTAIN TO THE PROVINCE OF ONTARIO-A CHART prepared by the Federal-Provincial Affairs Secretariat, Office of the Chief Economist, June, 1966.

T. THE SUBSTANCE OF RECOMMENDATIONS IN OTHER FIELDS TO THE ROYAL COMMISSION ON BILINGUALISM AND BICULTURALISM AS THEY PERTAIN TO THE PROVINCE OF ONTARIO - A CHART, prepared by the Federal-Provincial Affairs Secretariat, Office of the Chief Economist, June, 1966.

VOLUME I

The Legislatures And Executives

Of The Federation

by Dr. Eugene Forsey

October, 1966.

The Legislatures And Executives Of The Federation

The Democratic Principle, The House Of Commons And The Provincial Legislative Assemblies

At this late date, one would hardly suppose that this subject would need discussion. "Representation by population," in the House of Commons and in the provincial Assemblies, was one of the corner-stones of Confederation. Democracy, of course, was not. The franchise, in 1867 and for long after, though wide, was restricted. It is only since 1920 that all adult citizens have had the right to vote in Dominion elections. In some of the provinces, adult suffrage came a little earlier, in the province of Quebec only much later.

Representation by population has, of course, always been qualified. In the House of Commons, and in every provincial Assembly, the rural constituencies have been over-represented. In the Dominion Redistribution Acts, after each decennial Census, there has been provision to prevent any province from losing seats in the House of Commons unless its proportion of the total population of Canada has fallen by more than a certain percentage; and the British North America Act of 1915 provided that no province should have fewer seats in the Commons than in the Senate. The original British North America Act also provided

that the boundaries of twelve constituencies (then predominantly or largely English-speaking)[1] in the Quebec Assembly could not be changed except with the consent of the majority of the members from those constituencies. The Lieutenant-Governor was explicitly forbidden to assent to any such bill unless the Assembly had presented him with an Address certifying that this condition had been complied with. It is interesting to note that M. Lesage says this provision is one of the causes of his defeat in the recent Quebec election.

The Parliament of Canada has, of course, the legal power to widen or narrow the Dominion franchise in any way it pleases. It has also the legal power to throw overboard the principle of representation by population, either within any province or as between provinces. The Legislature of each province, likewise, has the power to widen or narrow the provincial franchise in any way it pleases, and the right to throw overboard the principle of representation by population. No one, however, seems to be proposing that the franchise should be narrowed, either for the House of Commons or the Assemblies; or that the principle of representation by population should be dropped, either for the House of Commons or the Assemblies.

Until recently, there would have been very little more to say on this subject. Now, there is a great deal. Six things have brought about this change.

The first is the provision for any province to "opt out" of Dominion-provincial "joint programmes."

The second is the Quebec proposal that the province

should be allowed to opt out of the purely Dominion Family Allowance plan.[2]

The third is what now appears to be the official demand of the Quebec Government that the Dominion should, in Quebec, withdraw from the payment of flat-rate Old Age Security, and hand the whole thing over to the province.[3]

The fourth is the co-existence of the Canada and Quebec Pension Plans.

The fifth is the proposals, from various quarters in Quebec, to endow the Senate (the existing Senate, or, more probably, a drastically different one) with large, new, independent powers.

The sixth is the proposals, also from various quarters in Quebec, to transfer large fields of jurisdiction, in Quebec, from the Dominion Parliament to the Quebec Legislature.

Each of these calls for careful examination.

Quebec has already opted out of many of the joint programmes, and wants to opt out of most or all of the rest. This has raised the question whether Quebec members of the House of Commons have any right to speak, let alone vote, on programmes their province has opted out of. The farther the opting out goes, the more insistently the question will be asked.

The answer seems to me to turn on the fact that the subject-matter of the joint programmes is, under the existing Constitution, provincial. The Dominion has a perfect right to legislate for grants-in-aid to approved provincial schemes; but

the jurisdiction in which they operate is provincial. Any province can come in, any province can get out. The distribution of powers remains precisely where the BNA Act (as interpreted by the Judicial Committee of the Privy Council) placed it. The provincial jurisdiction remains unimpaired, even if the province goes into the joint plan; the Dominion legislation providing grants-in-aid still applies to the whole country even if all the provinces opt out.

Quebec has a perfect right to opt out of any joint plan: it is merely resuming the full management of its own constitutional property. It has also a perfect right to stay in, or, having opted out, to opt in again. If it opts out, it has also a right to the money its people would have received under the joint plan if their province had stayed in, or the money they would get if their province opted in again. Whether the province gets the money as an unconditional grant from the Dominion Treasury or as a tax abatement is, in this context, immaterial. The people of Quebec would still, in effect, be paying their Dominion taxes, part of which, under the joint plans, would have come back to them. If they now choose to have their own provincial plans, the same amount of money should still come back to them.

If this is so, then the House of Commons, legislating on the joint plans, will still be legislating for the whole country, still deciding how much the people of Quebec, as well as the other provinces, shall get, whether as conditional grants-

in-aid, straight money compensation in lieu of grants-in-aid, or tax abatements. The Quebec members of the House of Commons will therefore have a perfect right to take their full share in deciding the terms of the joint plans, the size of the grants-in-aid and the conditions on which they will be made available, since these terms will settle not only the payments to the provinces which stay in the joint plans but the payments to Quebec as well. Whether in or out of the joint plans, Quebec remains, legally and constitutionally, just as much a part of Canada as any other province, and its members in the House of Commons are entitled to exactly the same rights as those from other provinces.

The same principle applies to Quebec's opting out of the Dominion Family Allowance plan. Though this is a purely Dominion Act, the subject matter is, equally, Dominion and provincial. The Dominion alone, or Quebec alone, or both at the same time, can grant to Quebec families any money Parliament or the Legislature sees fit, and on any terms Parliament or the Legislature sees fit. If Quebec asks the Dominion to stop making grants to Quebec families, and to let the Quebec Government have the money the Quebec families would otherwise have got, and Parliament consents, this does not take away one jot from the power of Parliament, which remains perfectly free to resume making grants to Quebec families whenever it sees fit. The Quebec members of the House of Commons would, again, seem to have a perfect right to take their full share in deciding how

large the family allowance payments in the other nine provinces should be, since this would determine how large the compensating payment (or tax abatement) to the Quebec Government should be. In effect, the legislation would still apply to the whole country, though its application in one province would be different; so the M.P.'s from all the provinces would be equally entitled to speak and vote on it.

In the third case, the purely Dominion flat-rate old age pension, both the Dominion and the province have jurisdiction, but if there is any conflict, provincial legislation prevails. Here, if any province chooses to act, any conflicting provisions of the Dominion Act simply cease to have effect in that province. Parliament does not lose any jurisdiction granted it by the Constitution; but a new set of conditions makes part of the jurisdiction inoperative as long as the provincial Act is in force.

If the Dominion then grants the Quebec Government, outright or as tax abatement, the money it would otherwise have paid Quebec's old people, then, though the Dominion Act will now apply only to the other nine provinces, the amount of the Quebec grant will depend on the terms of that Act; and, again, the Quebec members of the House of Commons will, accordingly, be entitled to speak and vote on the same terms as those from the other provinces.

If the Dominion does not make a compensating grant to Quebec, the case is different, though, for reasons which will

be discussed below in another context, it can be argued that the Quebec M.P.'s would still be entitled to take their full part in the decisions.

Fourth, there is the Canada Pension Plan. Here, Quebec has chosen to exercise its jurisdiction, and the Dominion Act has therefore no effect in Quebec. Again, Parliament has not lost any jurisdiction, but a new set of legal conditions makes part of its jurisdiction inoperative as long as the provincial Act remains in force. But in this case the province gets no Dominion money or services. The Dominion Act, directly and indirectly, applies only to the other nine provinces. So, as in the immediately preceding case, it would seem that the Quebec M.P.'s should have no say at all in any changes in the Dominion Act; but, again, for the same reasons which will be discussed below, it can be argued that they would be entitled to take their full part in the decisions.

None of the cases so far considered involves any change in the BNA Act. The two remaining cases would involve large, even fundamental, changes in that Act.

First, the proposals to endow the Senate with large, new, independent powers. The Senate already has an absolute veto over all Dominion legislation, and over all proposals for British Acts to amend the BNA Act. This veto it has exercised, on the whole, very sparingly, though it did, in 1936, turn down one proposed constitutional amendment. But there is a tacit understanding that the Senate will not permanently block any

legislation, or constitutional amendment, which the electors have plainly shown they want.

The proposed new powers for the Senate are, however, a totally different matter, especially as they are often coupled with proposals to transform the Upper House into an elected body, with half its members elected by "French Canada" and half by the rest of us.

What are the new powers proposed?

Here, it is not easy to be as specific as one could wish, since most of the proposals have something of the quality of ectoplasm. However, certain outlines seem to be visible.

First, the Senate would be given power to deal with "the rights of minorities,"[4] or "the representation and defence of the fundamental rights of the great cultural families which constitute our country, including the more or less inchoate family represented for the moment by what is generally called 'the third group.'"[5] Apart from Professor Morin's specifying that the rights in question would include the educational rights of "the English minority in Quebec and the French minority in other provinces,"[6] this is as near as we get to finding out which rights of which minorities would be covered. However, the important point for our immediate purpose is that whatever minorities might eventually be specified, power over them would, apparently, be totally withdrawn from the House of Commons, and confided exclusively to the Senate.

Exactly the same would apply to "radio, television,

discussion of constitutional amendments at the federal level,"[7] and "approval of treaties."[8]

The Senate at present has, of course, no executive powers whatsoever. Under these proposals, however, it would have powers, undefined, over "the appointment of ambassadors and federal judges" (elsewhere, "of the high federal courts").[9] One surmises that, as in the United States, the central Executive would nominate, but the appointments would require a two-thirds vote of the Senate to become effective.

These proposals would deprive the House of Commons of its present share in the power to protect the educational rights of Protestant and Roman Catholic minorities under section 93 of the BNA Act and the corresponding sections of the Manitoba, Saskatchewan and Alberta Acts (perhaps no great matter, since the sections are probably dead already, for all practical purposes); of its power even to discuss whatever rights of whatever minorities were placed under the exclusive jurisdiction of the Senate; of its power even to discuss broadcasting, treaties, or diplomatic or judicial appointments; and of its power to remove (or force to the country) a Government whose treatment of such minorities, or whose broadcasting policy, or treaties, or diplomatic or judicial appointments it disapproved.

This is by no means all the proposals would do to our Constitution. Other effects will appear when we come to discuss the suggested transfers of legislative jurisdiction from the Dominion to Quebec, and responsible government and the Cabinet

system. For the moment, it is enough to say that the proposed new powers for the Senate would, beyond doubt, involve very serious changes in the whole balance of the Constitution; that they could not be brought about except by an amendment to the BNA Act passed by the United Kingdom Parliament; that, by long established constitutional usage, that Parliament would not pass any such amendment except on Address by both Houses of the Parliament of Canada; that, by less long established, but now firmly embedded, constitutional usage, no such Address would be even presented to either House at Ottawa except with the prior consent of all the provinces; and that it is scarcely conceivable that either the House of Commons or all the provinces would give the required consent.

We come now to the proposals for transferring large parts of the jurisdiction of the Parliament of Canada, in Quebec, to the Quebec Legislature. Here, again, it is not always possible to be as precise as one could wish; but this time certain outlines are plainly visible.

Professor Jacques-Yvan Morin has provided the clearest statements on the subject, though anyone who thinks the kind of thing he has said is peculiar to him should take a look at M. Gerin-Lajoie's speech to the consular corps of Montreal,[10] or some of M. Rene Levesque's speeches,[11] or M. Ryan's lecture at Trent University,[12] or, last but by no means least, M. Daniel Johnson's statement to the Dominion-provincial Fiscal Conference.[13] The extent to which all these very different

people sing to one clear harp in divers tones is amazing.

In effect, what all of them are saying is that Quebec should become something very close to a sovereign state, with exclusive jurisdiction ever an enormous part of what now belongs to the Parliament of Canada, and that it should at the same time retain its full representation in the House of Commons.

In other words, the Members of the House of Commons from the other nine provinces would not be able so much as to open their mouths on the numerous subjects formerly within their jursidiction which would now have become the sole concern of the Quebec Legislature; but the Members from Quebec would still have full voice and vote on subjects which had now become the sole concern of the other nine provinces. To give a concrete example: Quebec would have its own banking system, under the sole jurisdiction of its own Legislature, and of course the Members of the House of Commons from the other nine provinces could have nothing to say about Quebec banks. But the Quebec Members would still have full power to speak and vote on banking legislation for the other nine provinces. And this situation would repeat itself for subject after subject after subject.

The transfer of powers from the Parliament of Canada to the Quebec Legislature can, of course, be accomplished only by an Act of the British Parliament, on Address from both Houses of the Canadian Parliament, which latter would be passed only after all the provinces had consented. Once the people of the

other nine provinces realize what is involved, it may be doubted whether their Members of the House of Commons, and their provincial Governments, would consent to any such heads-you-win, tails-I-lose, arrangement. They would be more likely to say that what's sauce for the Quebec goose should be sauce for the nine provinces' gander.

To this Quebec might make two replies.

First, section 94 of the BNA Act. Under that section, the Parliament of Canada can make provision for uniformity of any or all of the laws relating to property and civil rights (which now, thanks to the Judicial Committee, include most of social security and labour legislation) in all the provinces except Quebec; and, once a provincial Legislature has accepted the Dominion Act, the jurisdiction passes absolutely to the Dominion. From this provision Quebec, in the Confederation negotiations, opted out, absolutely. The section has never been used; but the Fathers of Confederation expected that it would be, on a large scale. No one has ever suggested that if it were, the Quebec Members of the House of Commons should be debarred from taking the fullest share in the proceedings, even though the legislation could apply only to the other nine provinces. So if Quebec now sought to have jurisdiction over (for example) banking in Quebec transferred to the Quebec Legislature, leaving the Dominion Bank Act to apply only to the other nine provinces, why should Quebec Members of the House of Commons be debarred from speaking and voting on that Dominion

legislation? What's sauce for property and civil rights should be sauce for banking!

Second, Quebec might point out that there are Dominion Acts which apply specifically only to one province (for example, the Newfoundland Savings Bank Act and the Quebec Savings Bank Act); and that it has never been even suggested that Members of the House of Commons from the other provinces should be debarred from speaking and voting on such legislation. If there came to be legislation which applied only to the provinces other than Quebec, why should Quebec Members be debarred from speaking and voting on that?

To the first of the Quebec replies, the rest of the country might say: "Section 94 is a very special exception to the general rule that Dominion jurisdiction, as defined by the BNA Act and the courts, applies to the whole country. True, it is a much wider exception than the Fathers of Confederation intended. But it remains a very special exception. If you ask only for the transfer of a few, not very fundamental, powers, then the precedent of section 94 might hold: the law takes no account of little things. But if you ask for the transfer of powers so numerous and so important that the jurisdiction of Parliament over the territory of Quebec becomes a mere shadow, that's quite another thing."

As most of the French-Canadians who propose the numerous and important transfers, and most of the English-Canadians who support them like to consider themselves advanced thinkers (though what they propose on this subject sounds more

like "Back to 1860"), one might perhaps invoke the Marxist principle of the transformation of quantity into quality. Transfer unemployment insurance in Quebec to the Quebec Legislature, leaving the rest of Dominion jurisdiction intact, and the authority of Parliament is not seriously reduced; it is, in fact, simply put back where it was before 1940. The change might be, probably would be, very hard on the unemployed; it would injure Quebec workers and the country generally by reducing mobility of labour; it might have other undesirable effects; but it would not break Canada into two. Similarly with both types of old age pension. Transfer banking in Quebec to the Quebec Legislature, leaving the rest of Dominion jurisdiction intact, and the authority of Parliament is very seriously undermined. Transfer a whole series of powers, and the moment comes when the cumulative effect is to transform Canada from a nation into a cobweb, from a reality into a phantom: a pale ghost sitting crowned (or, in view of the republican propensities of a good many of the advocates of such changes, uncrowned) upon ruins; and to leave its people with no anthem but English and French translations of Heine's dirge:

"Ich hatte einst ein schones Vaterland:
"Es war ein Traum."
(If I may venture an English translation:
"I used to have a splendid Fatherland:
"It was a dream.")

As to the other Quebec reply, about the Newfoundland and Quebec Savings Bank Acts, the rest of the country might say: "First, Parliament's power over savings banks extends to all the provinces; it has not abated one jot of that power; it has merely chosen not to exercise it in the other eight provinces. If the Members from the other eight provinces want the power exercised there, they have only to say so; meanwhile, since the existence of savings banks in Newfoundland and Quebec undoubtedly affects banking in these provinces, and therefore in the whole country, the Members from the other eight provinces may reasonably claim a right to speak and vote on such legislation. Second, the two Savings Bank Acts are highly exceptional and relatively unimportant; if the transfers of power were equally exceptional and equally unimportant, no one in the other provinces would be likely to bother about Quebec Members speaking and voting on such exceptional and unimportant legislation affecting only the other provinces."

In other words, if the exceptions become the rule, if Quebec for most purposes, not just a few, separates itself from the rest of Canada in matters where it has hitherto not been separate, then its Members of the House of Commons can scarcely expect to go on having their full say on a whole range of matters which, by Quebec's own desire, will have become none of Quebec's business. Quebec cannot opt out of most of Dominion business and still opt in on the control of the very business it has opted out of.

(b) Responsible Government and the Cabinet System.

Ever since Confederation, the Dominion has had responsible government and the Cabinet system. So have all the provinces (though in Manitoba and British Columbia in the early days it was a rather weak plant). In the Dominion and every province, the nominal Executive (the Queen or her representative) acts only (except in very rare and extraordinary circumstances) on the advice of a Cabinet responsible, answerable, accountable, to the House of Commons or the Legislative Assembly. By custom, all the Ministers must have a seat in Parliament or the Legislature, or must get one within a reasonable time; and if the Cabinet is defeated in the House of Commons or the Assembly, on a motion of censure or want of confidence, or on any motion which it considers of sufficient importance, it must either resign and make way for a new Government in the existing House, or else ask for a dissolution of Parliament or the Legislature and seek a new majority from the electors. In the two jurisdictions where there is an Upper House, the Dominion and Quebec, the Cabinet is not responsible to that House, and a defeat there does not entail either resignation or a request for dissolution, though a Government defeated in the Upper House could, of course, ask for dissolution in the hope that the electors would give it a fresh majority so large as to induce the Upper House to give way.

No one of any consequence has proposed that the Dominion should give up responsible Cabinet government. Several

people of importance in Quebec, notably M. Daniel Johnson and M. Gerin-Lajoie, have proposed that that province should change to a presidential system, apparently on the model of the United States, or perhaps of Gaullist France. As the provincial Legislature (that is, the Lieutenant-Governor, the Legislative Council and the Legislative Assembly) has full power to amend the Constitution of the province in any way, "except as regards the office of Lieutenant-Governor," there is presumably no legal obstacle to such change, provided the Lieutenant-Governor's legal powers (such as the summoning, proroguing and dissolving of the Legislature) are left untouched, and provided the Lieutenant-Governor assents to the necessary Bill or Bills, and provided the Dominion Government does not instruct him to reserve the Bill or Bills, and (if he does not refuse assent, and is not instructed to reserve) provided the Dominion Government does not disallow the Act (or Acts) within one year of its (or their) arrival at Ottawa. It is exceedingly unlikely that the Lieutenant-Governor would refuse assent, or that the Dominion Government would intervene. The courts would, of course, nullify any legislation taking away any of the Lieutenant-Governor's legal powers, as they did the Manitoba Initiative and Referendum Act.[14] But there would appear to be nothing to prevent Quebec from enacting that, for example, no Minister should have a seat in the Legislature, or that the Ministers should not have to resign, individually or collectively, or ask for a fresh election, on defeat in the Assembly.

For the Dominion, the only questions that arise affecting responsible government and the Cabinet system have to do either with the proposed new powers for the Senate, or with the transfer of large powers from the Dominion Parliament to the Quebec Legislature.

Take, first, the proposed new powers for the Senate.

To begin with, would legislation in respect to the rights of minorities, radio, television, constitutional amendments, and approval of treaties have to be initiated by the Senate itself, without regard to the Cabinet, or would the Cabinet draft the legislation and submit it to the Senate for approval, amendment or rejection?

Second, if the Senate rejected legislation in these fields which the Cabinet considered essential, or insisted on passing legislation which the Cabinet considered disastrous, what would the Cabinet do? If it were a case of the Senate rejecting Cabinet legislation, would the Cabinet resign, or ask for a dissolution of Parliament, or would it merely have to put up with the Senate's decision? If it was entitled to get a dissolution of Parliament, and won the ensuing election, would the Senate have to give way, or could it still impose its veto? If, on the other hand, the Senate insisted on passing legislation the Government objected to, would the Cabinet have to advise the Governor-General to give the royal assent? If the Cabinet could refuse to give such advice, what would become of the Senate's power? If the Cabinet were obliged to advise assent,

willy-nilly, what would become of its responsibility to the House of Commons? Suppose the Cabinet advised assent, and the House of Commons censured it for doing so? The problems which would arise are a good deal like those which would result from the successful grafting of the head and neck of a giraffe on to the chassis of a dachshund.

And they would be c ompounded if the Senate became a fifty-fifty affair, and if large parts of the jurisdiction of Parliament, in Quebec, were transferred to the Quebec Legislature. We should then have a large body of Senators from Quebec in a position to, for example, defeat a treaty which affected only the other nine provinces, even though the people of those provinces, as represented by their Members in the House of Commons (or even by their provincial governments) ardently wanted to have the treaty come into effect. How would the other nine provinces relish having broadcasting under the exclusive control of the Senate, especially a fifty-fifty Senate? Nor does this by any means exhaust the possibilities.

And what about the power over appointment of ambassadors and judges, especially the latter? Professor Morin says the power would apply to "federal judges", or "judges of the federal high courts." Does this mean only the Supreme and Exchequer Courts of Canada, or does it include judges of the superior, district and county courts in all the provinces, or only in the nine? Or what? It seems unlikely that Professor Morin, or anyone who shares his views, means the second. If he means the third, then Quebec Senators would have

a large say, perhaps a decisive say, in the appointment of judges in most of the courts of the nine provinces, while the Senators from the nine provinces would have no say whatever in the appointment of Quebec judges.

The whole thing is enough to make one's head swim. Most decidely no such scheme could be entertained for a moment until it had undergone the most rigorous and detailed examination. Even then, of course, it could not be brought into effect legally, except by an Act of the British Parliament, on Address from both Houses of the Canadian Parliament, and by unanimous consent of the provinces. The prospects of such consent being given, once the consequences had been made clear, seem remote.

Finally, under this head, there is the question of the effect on responsible government and the Cabinet system of the transfer of large parts of Dominion jurisdiction in Quebec from the national Parliament to the Quebec Legislature.

Under Professor Morin's proposals, (which, it must be repeated, are not substantially different from those of a good many other people in Quebec, including M. Daniel Johnson), Parliament's powers over Quebec would be reduced to defence, interprovincial trade and transport, monetary policy, the tariff, broadcasting, unemployment insurance, equalization grants to the poorer provinces, and a small part of external affairs.[15] (M. Claude Ryan's not-so-different proposals, in his Trent lecture, he is careful to describe as a "minimum programme.")[16]

This would mean that only seven departments, at most, would have any jurisdiction over Quebec: External Affairs, Labour (the powers of both in respect to Quebec would be minimal), Finance, Defence, Trade and Commerce, Transport and whatever department dealt with broadcasting. Would Quebec be willing to have its representation in the Cabinet cut from nine to seven? Would the other provinces be content to see all seven of these portfolios go to Quebec Ministers? Would Quebec claim a right to have a Minister from Quebec heading a department which dealt solely with the other nine provinces? Would the other nine provinces admit such a claim? Would Quebec consider it had a right to the Prime Ministership, even though it had separated itself from Canada for most purposes? Would the other nine provinces admit that claim? Whether or no, and whatever the number of Ministers from Quebec, what would such Ministers do when the Cabinet was discussing matters which affected only the other nine provinces? What would a Prime Minister from Quebec do? Would they withdraw? Would they remain, but reduced to silence, either by law or by a self-denying ordinance?

Besides, some of these who propose these fancy schemes, notably M. Lesage, M. Johnson, and the two Quebec trade union federations and the Catholic Farmers' Union, want to have the Government of Quebec consulted on matters which are, even under their proposals, left to the central power: for example, defence, external trade, and fiscal and monetary policy.[17]

Why a provincial Government, elected by provincial constituencies, on a provincial franchise, on provincial issues, to discharge provincial responsibilities, should be allowed to horn in on national decisions, no one can satisfactorily explain, except, of course, by saying that the Government of Quebec is the Government of one of the two "nations" which inhabit, and divide, the territory still known as "Canada." But the only logical issue of the two-nations theory is the total disappearance of any central power whatever, to be replaced either by purely diplomatic relations, such as those between Great Britain and France, or by certain very limited common organisms established by treaty. So that horse won't run; not in this race.

The voice of Quebec in the Government and Parliament of Canada is the Ministers, Senators and Members of the House of Commons from that province. If the Legislature of Quebec takes over most of their legislative functions, and the Executive Government of Quebec much of the rest, then the Quebec Ministers in the Dominion Cabinet, the Quebec Senators and Members, will be left with little except the power to interfere in matters which, by their province's own decision, will have become none of their business. M. Daniel Johnson seems to think this would lead to "harmony" between Quebec and the rest of the country. Anyone who believes this can believe anything.

Proposals such as we have just been considering really amount to saying that Quebec can be in and out of Canada at the

same time; that it can be almost independent, and at the same time keep a large, perhaps decisive, share in power in the country it has become almost independent of. They are, plainly, designed to give Quebec as many as possible of the advantages of independence with as few as possible of its disadvantages. By the same token, they would give the rest of Canada just the reverse.

They are often presented to us as at least better than outright separation, or even than Associate States. They are not. They would in fact be far worse. Even the St-Jean-Baptiste Society's scheme for Associate States, ramshackle and unworkable as it is, would allow the rest of the country, "English Canada" (though it would contain about a million French-Canadians), to run its own affairs, apart from those entrusted to the weird and wonderful common organisms hazily sketched out by the Society. Two totally separate states would, from this point of view, be even more satisfactory.

(c) The General Issue: Majority Rule and Minority Veto.

What has already been said under the specific heads seems pretty well to dispose of this "general issue." If there is to be anything more than the kind of counterfeit Canada which M. Daniel Johnson, and those who share his views on this matter would give us, then there is really no choice but to decide which matters are national, and must therefore be entrusted to a national Government and Parliament, without any veto for any group, and which are provincial, and must therefore be entrusted

to provincial Governments and Legislatures, without any veto for any group. There may, within limits, be special provisions to meet the particular needs of particular provinces, as there are now, in the BNA Act, for most of the provinces. There must be guarantees for individual freedom and for certain minority rights. This, in effect, is what the Fathers of Confederation provided for. Some of the details may need revision, but the general plan does not. Any province, or any group, which wants to combine majority rule and minority veto is asking for dry water, boiling ice, sour sugar, stationary motion.

Perhaps "the conclusion of the whole matter" has been best stated by Mr. Stan McDowell, of the Ottawa Journal's Quebec Bureau, in a brilliant play on the various, and slippery, meanings of the word "nation:" "If a nation (that isn't a nation) doesn't try to become a nation (that is a nation) there is really no problem in having two nations (that aren't nations) in one nation (that is a nation). But if it does, the 'nation one and indivisible' is fated to become two, and invisible."

Footnotes

1. British North America Act, 1867, section 80, and schedule 2. The constituencies were: Pontiac, Ottawa and Argenteuil, north of the Ottawa River, and Huntingdon, Missisquoi, Brome, Shefford, Stanstead, Compton, Wolfe and Richmond, Megantic, and the Town of Sherbrooke. The County of Ottawa was about 48 per cent English-speaking, Shefford 32 per cent, Megantic 38 per cent. The other nine seats had large, usually very large, English-speaking majorities, of the order of 71 to 92 per cent.

2. Declaration de l'honorable Daniel Johnson a la quatrieme reunion du Comite du regime fiscal, Ottawa, 14 et 15 septembre 1966, p. 8 (hereinafter cited as Johnson, Declaration); Ontario Official Summary of the Brief of the CNTU, the Quebec Federation of Labour and the Catholic Farmers' Union to the Quebec Constitutional Committee, p. 13 (hereinafter cited as Triple Brief).

3. Johnson, Declaration, p. 8.

4. Jacques-Yvan Morin, Canadian Forum, February, 1965, p. 257; Claude Ryan, Journal of Canadian Studies, August, 1966, p. 10.

5. Ryan, loc. cit.

6. Canadian Forum, June, 1964, p. 65.

7. Morin, Canadian Forum, February, 1965, p. 257.

8. Ibid.

9. Morin, Cite Libre, juin-juillet 1964, p. 7; Canadian Forum, February, 1965, p. 257.

10. Le Devoir, 15 avril 1965, p. 5.

11. See, for example, Le Devoir, 8 juin 1963, p. 8; 24 mars 1964, p. 13; 11 mai 1964, p. 1.

12. Ryan, Journal of Canadian Studies, August, 1966, p. 11.

13. Johnson, Declaration, pp. 8-9, 19-20.

14. Judgement of the Judicial Committee In Re Initiative and Referendum Act (1919) A.C., 935.

Footnotes (cont'd)

15. Morin, Canadian Forum, June, 1964, p. 65; February, 1965, p. 257.

16. Ryan, Journal of Canadian Studies, August, 1966, p. 13.

17. Hon. Jean Lesage, Le Devoir, 29 septembre 1964, p. 1; Triple Brief, p. 11; Summary of Triple Brief, Le Devior, 29 septembre 1966, p. 1; Johnson, Declaration, pp. 19-20.

Constitutional Monarchy

And The Provinces

By Dr. Eugene Forsey

October, 1965.

Constitutional Monarchy and the Provinces

The first thing to get clear is that the provinces are not themselves "monarchies". They are parts of a constitutional monarchy, Canada. The Queen is Queen of Canada, not Queen of Ontario, Queen of Quebec, Queen of British Columbia, etc. She is, of course, Queen *in* all these provinces. But her title is "Queen of Canada", and it is as such that she is Queen *in* each of the provinces.

This is important, because it has been suggested that Quebec, for example, might be allowed to become a republic, with a president, but still remain part of something called "Canada". The analogy, presumably, would be with India, Pakistan and the other republics which remain part of the Commonwealth. But the analogy is false. India, Pakistan and the other republics within the Commonwealth are distinct political nations; each of the provinces of Canada is *part* of *one* political nation. No Canadian province could become a republic without ceasing to be part of the one political nation, Canada.

To propose, therefore, that any one province should be allowed to become a republic is to propose secession, separatism, total independence, for that province.

If the people of any province favour republicanism, but want to remain part of Canada, then the only thing they can do is to try to make *Canada* a republic.

The second thing to get clear is that Canada is a constitutional monarchy by *deliberate choice*. It is not by

accident, nor from absent-mindedness, or coercion, or the fear of coercion, that the British North America Act, 1867, section 9, says: "The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen". On the contrary, Sir John A. Macdonald, in the Confederation Debates in the Parliament of the Province of Canada, took pains to emphasize that the Quebec Resolutions on the subject (on which section 9 of the Act is based) had "met with the unanimous assent of the Conference";[1] and it is noteworthy that not one of the opponents of Confederation, in any province, advocated republicanism.

The London Resolutions on the monarchy reiterated those of Quebec.[2] The third and fourth drafts of the British North America Bill proposed that the new nation should be called the "Kingdom of Canada",[3] and this was only dropped in deference to the real or supposed sensibilities of the Americans.[4] Sir Leonard Tilley then suggested, as a synonym, the old French word "Dominion",[5] which had disappeared from that language but had been preserved in English: and Lord Carnarvon, the Colonial Secretary, writing to the Queen, at the request of the Fathers of Confederation, told her: "The North American delegates are anxious that the United Provinces should be designated as the "Dominion of Canada" (his italics). "It is a new title; but intended on their part as a tribute to the Monarchical principle which they earnestly desire to uphold."[6] It might be added that one of the most vociferous supporters of that principle was Sir George Etienne Cartier.[7]

It would, indeed, have been very surprising if any British North American of consequence had advocated republicanism in the 1860's. Not one square inch of any of the colonies or provinces had ever been under a republican form of government. New Brunswick, and Canada West (now Ontario) had, in fact, been founded by people who fled (or were driven) from the Thirteen Colonies precisely because they refused to live under such a government; and the motto of the province of Ontario to this day commemorates both the monarchism of its founders and their resolve to maintain it: "Ut incepit, sic permanet, fidelis:" "As she began, so she remains, faithful". Even the republican rebel Mackenzie, after a sojourn in the United States, begged to be allowed to come back and become a loyal subject of the Queen, declaring that if he had had any idea of what a republic was like, he would have been "the last man in America" to try to set one up in Canada;[8] and the American Civil War took any remaining gilt off the republican gingerbread. The Confederation Debates are sprinkled thick with expressions of horror at American republicanism and "mob rule", and of pious gratitude that British North Americans had been spared such a fate.[9]

Why, then, do we now hear so much talk of republicanism, both in French and in English Canada?

First, because republics are once more the fashion, especially since the Second World War, and a lot of people want to be in the swim. All the countries behind the Iron Curtain are republics. India, Pakistan, Ghana, Nigeria, Kenya, Tanzania, Uganda, Zambia, Cyprus, South Africa, Ireland, Singapore, South

Korea, South Vietnam, Algeria, Tunisia, Egypt, Syria, Lebanon, Israel, the two Congos, the Sudan, Mauretania, Mali, Senegal, Dahomey, Guinea, the Ivory Coast, Italy, have all, within the last few decades, joined the ranks which had already included the United States, France, and the whole of Latin America. (Incidentally, which of these not altogether similar polities would Canadian republicans take for a model?)

Second, some Canadians seem to have got it into their heads that people who live in a republic are somehow "freer" than those who live in a constitutional monarchy. It would be interesting to know precisely how and why. It is not obvious that South Africans (especially coloured South Africans), or Ghanians, or Russians, or Chinese, or Hungarians or Egyptians, for example, or even Americans, Frenchmen, Italians or Indians, have more freedom than we have.

The same comments apply to the notions that as a republic we should be more "independent", or should have more "dignity". How and why?

Then there is the contention that a republic would be more truly "Canadian". This also is not obvious. It is not only because no part of this country has ever been a republic or part of a republic that to become one would be an abrupt break with our history. It is also that our monarchy, our British monarchy, our Anglo-French monarchy, our historic monarchy, is part of the Canadian tradition. It is not something alien. It is bone of our bone and flesh of our flesh.

At this point, someone may say, "All very well if you

are of British ancestry. British settlers brought the British monarchy with them in their baggage. But what about the French-Canadians? What about the people of other origins who have come since: the Germans, the Scandinavians, the Ukrainians, the Hungarians, the Dutch, the Japanese and Chinese, and the rest? Surely the monarchy is no part of their Canada?

Yes, it is. It is plain enough that British-Canadians got their ideas of constitutional government from Britain. But where did the French-Canadians get theirs? From France? From Rome? From the United States? From Latin America? From the Laurentian Shield or the Aurora Borealis or the waters of the St. Lawrence or the Saguenay, or their own inner conscious, or subconscious, or unconscious? No; just as plainly, definitely and unmistakably as the British-Canadians, from Britain; just as plainly, definitely and unmistakably as they got their Civil Law from France.

As for the others, the Germans, the Scandinavians, the Chinese and Japanese and the rest: they came here, nearly all of them, of their own free will, knowing that they were coming to a country with a British constitutional monarchy, knowing that they would have to adapt themselves to this fact, just as, if they settled in Quebec, they would have to adapt themselves to a French Civil Law. They deliberately chose to become Canadians, deliberately chose to come to a country whose institutions had already been shaped by the two founding peoples who were here in 1867; deliberately chose to come to a country whose constitution was explicitly declared to be "similar in principle

to that of the United Kingdom".[10] That constitution they accepted as part of the Canada of which they chose to become citizens. That constitution they have lived under and worked under and prospered under.[11]

In the working of that explicitly British, monarchical constitution, French-Canadians and "other", non-British, non-French, Canadians have taken a distinguished part.

This is not to say that the constitution cannot be changed, that we are not free to become a republic if we want to. We were free to do so in 1867; we have been free to do so at any time since; we are free to do so now. But if we are to do it, let it be for good and sufficient reasons, not on the false ground that our existing monarchical constitution is "foreign" or "un-Canadian". Canada is not something rootless, floating in empty space; it is not simply a land mass. Canadians are "not simply so many bipeds living within a given habitat which colours and determines all else in our lives. Man is a being who lives in time as well as in space; and the life of a people is rooted in time as well as environed by geography."[12] Our monarchy is part of our constitution; our constitution is part of our history, which has shaped our character as a people. To get rid of it is to change that character; and such a change is "not by any to be taken in hand unadvisedly, lightly or wantonly, but reverently, discreetly, advisedly, soberly", from deep conviction, grounded on rational examination of the facts.

There is no point in change for its own sake, or just for the sake of having the very latest thing in constitutions.

(What matters in a constitution is not how new it is but how good it is, how well it works.) The bigger the change, the heavier the onus upon those who propose it to prove that it is necessary, or even useful. Changing Canada to a republic would be a very big change, the more so as there is an infinite variety of republics to choose from. The change would be fiercely resisted, at least in the Atlantic provinces, Ontario and British Columbia. A first-class row for sufficient reason is tolerable, may even be necessary; a first-class row without sufficient reason is criminal folly. What good would this particular first-class row do?

The republicans should be asked not only how their nostrum would make us freer or more independent, but also how it would give us better government, or more welfare.

Would a republic, in and of itself, give us a better distribution of legislative power between the Dominion and the provinces; stronger provinces, or a stronger Dominion, or a better balance of the two? Would it give us a better Executive (President or Cabinet): wiser, stronger, more responsive to public opinion? Would it rescue us from the tribulations, real or supposed, of minority government? Would it give us a better balance between Government and Parliament, or between either and the Civil Service? Would it give us better municipal government? Would it reduce the dangers of corruption? Would it make government cheaper?

Would a republic, in and of itself, give us more welfare,

a higher standard of living? (Joining the American republic might; but that is a very different thing.)

These are the eminently practical questions the republicans must be made to answer, and answer in detail, with reasons. They have no right to ask us to buy a magic potion.

One alleged reason for changing to a republic is that it would help solve the problems arising out of French Canada's position in Confederation. If it were true, this would be a weighty reason indeed. But is it true? This is precisely the place where it is most necessary to ask how the magic potion would work, what specific ills it would assuage or cure.

Would a republic automatically mean more bilingualism in the national administration and public service, or in the provincial or municipal administrations and services, or in private business? Would it automatically mean more bilingualism in the courts? Would it automatically mean more top jobs for French-Canadians in public administration or private business? Would it automatically mean more French-Canadians in the Cabinet, or more of them at the head of important departments? Would it automatically produce any change in the Senate or the Supreme Court of Canada? Would it automatically mean more French education for French-Canadian children outside Quebec? Would it automatically mean wider taxing powers, or more revenue, or wider legislative jurisdiction, or a "special status" for Quebec? Would it automatically add one copper to any French-Canadian's pay, or shorten his working day by a fraction of a second? Would the country choose a French-Canadian President oftener than it chooses a French-Canadian Governor-General? Would a republic

automatically even smooth the path to an "Associate State of Quebec," or an independent Quebec?

An amiable, if rather fuzzy, desire to help the French-Canadians is undoubtedly one source of the present talk of republicanism. There are at least two others: the carbon copy theory of Canada, and the rubber stamp theory of the Crown. Both are deep-rooted, but both are false.

The carbon copy theory of Canada assumes that this country really is, and certainly ought to be, a second United States. (Why on earth there should be a second, no one pauses to explain.) But, plainly, it is a poor copy. The Fathers of Confederation smudged it. It is high time we got busy with our erasers and cleaned it up.

There could not be a wilder misconception of the origin and nature of Canada. The Fathers of Confederation were not "a lot of mixed up kids", who tried to copy the United States and failed. They tried to make a very different kind of country, and they succeeded.

The Americans deliberately broke with their past. We have repeatedly and deliberately refused to break with ours. The most important thing for us about the American Revolution is that we, both French-Canadians and British Loyalists, refused to have anything to do with it, and indeed strenuously resisted American efforts to "liberate" us. The most important thing about the rebellions of 1837 is that they failed, and for the same reason: that most of the people, French-Canadians and British-Canadians alike, refused to have anything to do with them.

The Americans deliberately set out to make theirs a country of one language and one culture. We deliberately chose to preserve two languages and two cultures.

The Americans chose a decentralized federalism. We set out to create a highly centralized federalism. "They commenced at the wrong end", said Sir John A. Macdonald. "Here, we have adopted a different system."[13]

The Americans left most of their criminal law in the hands of the states. We entrusted the whole of our criminal law to the central Parliament.

The Americans made most of their judges elective, and left most of their courts to the states. We made all the judges of our superior, district and county courts appointive, and placed the appointments in the hands of the central Government.

The Americans provided for no central control of the states, except what might be necessary to preserve a republican form of government. We placed at the head of every provincial Government an official appointed by the central Government, instructed by the central Government, and removable by the central Government; endowed him with the power to reserve assent to provincial bills and send them to the central Government for assent or veto; and, to make assurance triply sure, gave the central Government power to wipe any provincial Act off the statute book within one year.

The Americans in effect forbade denominational schools supported by public funds. We guaranteed their existence, and, all provinces but one, gave the central Government and Parliament

special powers to enforce the guarantees.

The Americans wrote into their Constitution a very explicit and detailed Bill of Rights. We relied on the "well understood" unwritten "principles of the British Constitution".

The Americans provided for fixed election dates, for their President, Senators and Representatives. We provided only for a maximum duration of Parliament, with no "term" at all for the Government. (An American President who wins an election has to take a fresh oath of office; Franklin Roosevelt, who held office for a total of twelve consecutive years, was President four times. A Canadian Prime Minister who wins an election does not have to take a fresh oath of office; Sir Wilfrid Laurier, who held office for fifteen consecutive years, was Prime Minister only once.)

The American Congress and state legislatures are hedged around by constitutional prohibitions. They cannot, for example, confiscate property, or take one man's property and give it to another, or pass retroactive laws. Our Parliament, within the limits of subject and area laid down by the British North America Acts, can do anything; for example, confiscate property, take one man's property and give it to another, or pass retroactive laws. So can our provincial legislatures, subject to the Dominion power of disallowance.

No wonder our constitution does not work like the American! No wonder the "carbon copy" looks smudged! But it does not follow that we should get to work with erasers. The French-Canadians, for example, might not be altogether pleased by the erasure of section 133 of the British North America Act,

guaranteeing a limited official bilingualism in Quebec and at the centre. The Roman Catholics might not be altogether pleased by the erasure of section 93 and the corresponding sections of the Manitoba, Saskatchewan and Alberta Acts. Very few of us might be pleased to see ten systems of criminal law instead of one, or most judges elected by popular vote.

A good many people, weary of a rapid succession of Dominion general elections (three in three years, five in eight years) may think they would like the American system of fixed election dates. They might find the reality disillusioning. In the United States, no matter how unworkable a legislature may prove to be, it must go on till the preordained date; no matter what great new issues may arise, no matter how great the wave of hostile public opinion, there is no means of hastening by so much as one hour a fresh consultation of the people. Here, a fresh dissolution of the legislature can break a deadlock, as in Quebec in 1936; here, parliamentary obstruction can force a parliamentary majority to go before the people on a great new issue where there is reason to believe public opinion is against that majority, as happened with Reciprocity in 1911. And it is noteworthy that the power to break a deadlock, or to bring the legislature into harmony with a changed public opinion, by dissolution of that legislature, is a power of the Crown.

That brings us to the other great current fallacy, the rubber stamp theory of the Crown. This can be very simply stated: the Crown, or its representative, must always follow the advice of the Cabinet in office at the moment, even if that Cabinet has just been resoundingly defeated in an election; or even if that

Cabinet refuses to meet Parliament for more than the single sitting, once a year, that the law requires; or even if that Cabinet cannot muster a majority in Parliament and an alternative Cabinet which could do so is possible.

Parliamentary responsible government is a wonderfully sensitive, flexible and effective instrument, far more so than the American system. But it can also be a far more dangerous system than the American. In the American system, everybody is hedged around with legal prohibitions, which will be enforced by the courts. In our system, this is not so. If a provincial legislature takes it into its head to prolong its own life by a year, two years, ten years, it can do so. No law prohibits. No court can say no. If a Prime Minister tries to bludgeon Parliament or a legislature into submission by a series of elections, again no law prohibits, no court can say no. As far as the law goes, he can dissolve a new Parliament or legislature before it can even meet. If he lets it meet, he can dissolve it any time he thinks it won't vote for him. And he can go on doing it as often as he likes. He can totally prevent Parliament or the legislature from transacting any business at all, or any business except what happens to suit him. He can call elections every few months, till the people, in desperation, either give him a majority or revolt. Not one shred of illegality; and all the quintessence of democracy: what can be more democratic than appeal to the people? But the result would be that Governments would be irremovable except by their own consent, or by force of arms. Fantastic? Impossible? One Canadian Prime Minister, after being defeated at the polls, tried to fill up the Senate and the

Bench. Another Prime Minister tried to dissolve Parliament before it could vote against him on a motion of censure. As recently as 1952, there were persistent rumours that a provincial Government contemplated dissolving the newly elected legislature before it could even meet.

What does stop this kind of thing happening in Canada? Generally, simply the sense of decency and fair play and responsibility which we took over from Britain with parliamentary government itself. Generally, Ministers remember that they are not the people's masters but the Queen's servants, answerable to the Queen's faithful Commons; bound to let Parliament meet, bound to let it vote, bound to abide by its verdict unless there are substantial reasons of public policy for appealing to the electorate. But if a Prime Minister tries to turn parliamentary responsible government into unparliamentary irresponsible government, then only the Crown can stop him; only the Crown can keep Government responsible to Parliament and Parliament to the people; only the Crown can prevent Parliament from degenerating into a rubber stamp for the Prime Minister, elections into mere plebiscites --- plebiscites whose verdict the Prime Minister accepts only if it suits him ---, the Prime Minister, prime servant, into prime despot, the whole process into an elaborate farce, swindling the public at the public expense, with the public helpless to protect itself.

The Crown is the embodiment of the interests of the whole people, the indispensable centre of the whole parliamentary democratic order, the guardian of the Constitution, ultimately

the sole protection of the people if M.P.s or M.L.A.s or Ministers forget their duty and try to become masters, not servants. The Crown's reserve power to refuse the advice of Ministers when that advice imperils the Constitution still remains, as Lord Attlee reminded us in 1952 and 1959; and if parliamentary government is to survive, it must remain. Parliament is the very Ark of the Covenant of the Canadian tradition. But a system in which Parliament exists, debates, votes, only at the pleasure of a jack-in-office, is a snare and a delusion. In Pym's words, "Parliaments without parliamentary liberty are but a fair and plausible way into bondage. Freedom of debate being once foreclosed, the essence of the liberty of Parliament is withal dissolved."

Responsible government means responsibility not only to Parliament, or to the electorate, but also responsibility for the interests of the nation as a whole. It has been maintained, by a distinguished Canadian professor, that a Prime Minister's supreme duty is to keep his party united and in office. That was not the doctrine which led Peel to carry the repeal of the Corn Laws, at the price of destroying his party. It was not the doctrine which led Wellington to support him. The true doctrine is that "The Queen's Government must be carried on", that "there are times", as Meighen said, "when no Prime Minister can be true to his trust to the nation he has sworn to serve, save at the temporary sacrifice of the party he is appointed to lead." That is something Prime Ministers are a good deal more likely to remember if they think of themselves first and foremost as the

Queen's servants, not just party leaders with "an ambition to be re-elected".

The Crown stands also for something else which is essential in the Canadian tradition: for a Canadianism which, while utterly loyal to Canada, looks beyond Canada. It reminds us that Nationalism is not enough. Another distinguished Canadian professor, some dozen years ago, extolled the "pure" Canadian, "who knows only Canada", "for whom the old world has virtually ceased to exist". It apparently did not occur to him to ask what use this monstrosity would be in NATO or the U.N.; if he had had any conception of loyalty to a Queen of a world-wide Commonwealth, such pernicious nonsense would never even have entered his head.

The Crown is in truth "the imperial fountain of our freedom". If we abolished it, and substituted a national President and ten little presidents for the provinces, then of two things one: either we should have to change our whole system of government and replace it by an American or Gaullist or Soviet or other totally alien system; or we should have to give the presidents substantially the same powers as the Queen, the Governor-General and the Lieutenant-Governors now have. If we go for Gaullism, or plump for "popular democracy", or even the American congressional variety, we shall be entering on an enterprise which will be a violent break with our whole history, our whole constitution, all our political ideas, habits and practices; and exercise in political and constitutional bedlamism, the issue of which no man can even dimly foresee. If we embark

on the more modest attempt simply to replace the Crown by presidents, in the innocent hope that we can leave the structure of parliamentary responsible government otherwise intact, we shall still face formidable problems. Unless we give the presidents the reserve powers, we shall run the risk of Prime Ministerial dictatorship. But the reserve powers are not easy to define in precise terms, and the constitutional draftsman might end up by giving the head of state, and his provincial counterparts, either too much power or too little.[14] Even if he succeeded in this, his troubles (and ours) would not be over; for he would have to devise a method of election which would provide some hope that the presidents would be reasonably impartial politically; no small task.

And all this effort, all this ingenuity, all this tearing up of our roots; all the time, all the strife, the process would involve; for what? What would it all accomplish? What good would it do? Who would be the better for it? Heaven knows, we have problems enough, constitutional and otherwise, to occupy us, problems national and international, constitutional, political, social, economic, urgent, practical problems to which we must find some tolerable solutions if Canada is to preserve any life at all, let alone a good life. Surely they are enough to tax all the intellectual, spiritual, moral resources we have, without gratuitously adding anything extra that can be avoided?

Unless the proponents of a Canadian republic can produce massive evidence that the change is a matter of urgent public importance, the whole notion must be summed up in the

verdict of Sir Robert Borden on a very different subject: "One of the most absurd suggestions ever to come to my attention".

Footnotes

1 Parliamentary Debates on the Subject of the Confederation of the British North American Provinces (Quebec: Hunter, Rose and Co., 1865), pp. 33-4. (Hereinafter cited as "Confederation Debates.")

2 Confederation Documents, edited by Sir Joseph Pope (Toronto: Carswell, 1895), pp. 39 and 94.

3 Ibid., pp. 159, 160, 162, 163, 164, 177, 178, 181, 182 and 190.

4 D.G. Creighton, John A. Macdonald: The Young Politician (Toronto: Macmillan, 1952), p. 458.

5 The Oxford English Dictionary calls it "obsolete French".

6 Letters of Queen Victoria, Second Series (London: Murray, 1926), vol. I, p. 394.

7 Confederation Debates, p. 59.

8 W.M. Kilbourn, The Firebrand: William Lyon Mackenzie and the Rebellion in Upper Canada (Toronto: Clarke, Irwin, 1956), p. 241. Note also the quotations from his petition to the Governor-General, p. 242.

9 Notably Cartier, loc. cit.

10 British North America Act, 1867, preamble.

11 This is important in relation to complaints that the phrase "the two founding peoples" relegates the "others" to second-class citizenship.

12 John Farthing, Freedom Wears a Crown (Toronto: Kingswood House, 1957), p. 14. The whole book is an admirable philosophical discussion of the basis and meaning of our monarchy.

13 Confederation Debates, p. 33.

14 See, for example, the attempt in Marcel Faribault and Robert M. Fowler, Ten to One: The Confederation Wager (Toronto and Montreal: McClelland and Stewart, 1965), in Articles 32 and 33 of their proposed new constitution, at pp. 128-9.

The Process Of
Constitutional Amendment
For Canada

by Dean W. R. Lederman

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The Process of Constitutional Amendment For Canada

I. Introduction

In 1967, Canada completes her first century as a federal country under the British North America Act. Also, at this particular time, Canadians find themselves urgently considering and discussing whether or not important changes should now be made in our federal constitution, that constitution having served us so far almost without substantial amendment. The main pressure for change comes from claims for better constitutional recognition of the French fact in Canadian life, both within and beyond the boundaries of the Province of Quebec. Among other things, this raises questions of the methods of constitutional change in a federal country which accordingly now require our attention in Canada more than ever before. (This paper expresses personal comment, opinion and analysis of the author concerning the central issues of method in constitutional change as they now confront us. Do we now bring the federal constitution home to Canada and, if so, on what terms as to domestic control of change or amendment?)

It appeared quite recently that this question was settled. A complete set of domestic constitutional amending procedures was agreed upon at a Federal-Provincial Conference of the Prime Minister of Canada and the Premiers of the Provinces on October 14, 1964, as embodied in the text of a bill entitled

"An Act to provide for the amendment in Canada of the Constitution of Canada." This was popularly known as the Fulton-Favreau Formula, being named for the two Federal Ministers of Justice primarily responsible for negotiating its final form. In February, 1965, a White Paper on "The Amendment of the Constitution of Canada" was issued under the auspices of the Honourable Guy Favreau, then Federal Minister of Justice.(1) This document set forth the history and present position respecting amendment, the story of the development of the Fulton-Favreau Formula and an analysis of the meaning of the Formula. Nevertheless second thoughts set in, primarily but not only in the Province of Quebec, and the final agreement of the Lesage Government and the Legislature of Quebec was not forthcoming as expected. Then in June of 1966 the Lesage Government was defeated by the National Union Party of Daniel Johnson, which had been explicitly opposing the Fulton-Favreau Formula. With the Johnson Government in power in Quebec, it is now clear that the whole problem of patriation and amendment of the Canadian Constitution is open for review once more.

In any event, the White Paper of 1965 is a full and careful historical document the text of which was accepted as accurate by the Federal and Provincial Governments before it was published. There is no point in recapitulating here what has been well covered in the White Paper. Accordingly, in what follows I assume a knowledge of the main elements of the White Paper and of the chief features of the proposed set of procedures for amendment known as the Fulton-Favreau Formula.

II The Constitution and the Technical System of the Fulton-Favreau Formula

About the first thing to be done if one is to consider methods of amending the constitution is simply to define the meaning of the category 'constitution' or 'constitutional law'. All law flows from or is part of the constitution, so that there is a sense in which all laws are constitutional laws, finding their legitimate ancestry proximately or remotely in what Professor Hans Kelsen called the Basic Norm.(2) Obviously one cannot subject all legal change to special amending procedures, so that more precise and discriminating definitions of the content of the 'constitution' are necessary. An excellent short definition is that of Sir Ivor Jennings,(3) who said that the word 'constitution' in its more precise sense "means the document in which are set out the rules governing the composition, powers and methods of operation of the main institutions of government, and the general principles applicable to their relations to the citizens." His example was the Constitution of the Irish Republic. In Canada, we have to think in terms of many statutory documents and as well of appropriate parts of the historically received English common law concerning the Crown. Nevertheless, I suggest that the sort of things we consider to be peculiarly constitutional, whatever their respective forms, are those described by Sir Ivor Jennings. And, of course, not all these things need to be subjected to special legislative procedures.

The Fulton-Favreau Formula has to face this many-sided problem of definition, and does it very well. It employs the general phrase 'the Constitution of Canada', and then proceeds to give this further definition in two ways: by examples in Section 11 and by spelling out sub-divisions of constitutional matters in Sections 2 to 8. Section 11 reads as follows:

> Without limiting the meaning of the expression "Constitution of Canada", in this Part that expression includes the following enactments and any order, rule or regulation thereunder, namely,
>
> (a) the British North America Acts, 1867 to 1964;
>
> (b) the Manitoba Act, 1870;
>
> (c) the Parliament of Canada Act, 1875;
>
> (d) the Canadian Speaker (Appointment of Deputy) Act, 1895, Session 2;
>
> (e) the Alberta Act;
>
> (f) the Saskatchewan Act;
>
> (g) the Statute of Westminster, 1931, in so far as it is part of the law of Canada; and
>
> (h) this Act.

This seems to suggest the Jennings concept of the word 'constitution', the examples giving some precision of definition without restriction to the sort of thing exemplified.

In addition, as indicated, Sections 2 to 8 of the Formula spell out more precisely defined sub-divisions of things constitutional, including, it should be noted, the separate constitutions of the respective provinces. In this way different types of constitutional change are assigned to different amending

procedures, as deemed appropriate. For example, amendments affecting "the powers of a province to make laws" would require a statute of the Parliament of Canada and the concurrence of the legislatures of all the provinces.(4) Thus a requirement for unanimity would be imposed respecting the whole of the federal distribution of legislative powers. On the other hand, a statute of the Parliament of Canada having the concurrence of "the legislatures of at least two-thirds of the provinces representing at least fifty per cent of the population of Canada" was thought to be enough to effect change in "the principles of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada."(5) Then, as a final example, when it came to amending the constitution of a province, "except as regards the office of Lieutenant-Governor", the Formula provides that a simple statute of the provincial legislature concerned would be effective (as indeed it has been since 1867).(6) Thus, for different sub-divisions of constitutional matters we go all the way from extraordinary and rigid to ordinary and flexible processes of change in the proposals made.

The main point to be grasped here is that the technical scheme of Part I of the Fulton-Favreau Formula is very ingenious and very good. Discriminating between different types of constitutional matters for purposes of assigning them to different modes of amendment in some way much like this is essential for any complete scheme of constitutional amendment. Moreover, the careful reader of the Formula will note that this is done there

in such a way as to indicate the priorities between the several clauses in Part I in the event of overlapping of the concepts they contain. The realities and difficulties of later interpretation have been carefully kept in mind. In any event, to continue with the main point, there will always be some things so basic and so much the concern of all that only unanimity is appropriate to effect change. Also there will always be some other things less basic but still very important and affecting all, so that something like the rule of two-thirds and fifty per cent is appropriate as an extraordinary process for change. And of course there will always be still other constitutional matters that are appropriate for change within a single province simply by a statute of that province, or at the federal level by a simple statute of Parliament. These then are examples of discriminations made in Part I of the Formula, and, as a matter of technical system and good drafting, a scheme with this multiplicity of discriminations seems almost inevitable. It seems to arise almost necessarily out of the history and nature of our constitutional life in Canada. As the White Paper shows, this range of distinctions has been developed in the course of several official constitutional enquiries and conferences over a long period of years.(7)

It must be remembered of course that no draftsman can ever make everything in a complex procedural statute absolutely clear. Not everything is clear about the interpretation of the Fulton-Favreau Formula, as some critics of it have shown.(8)

But every draftsman reaches the point in such cases where the resolution of residual uncertainties is best left to be worked out by interpretation in the courts, and, in my view, so far as technical clarity is concerned, that point has pretty well been reached in the 1964 Formula.

Nevertheless, in praising the system and technique of the drafting of Part I of the Fulton-Favreau Formula, I am not necessarily upholding the substance of what the Formula does in every respect. I would agree in principle, for example, that too many constitutional matters are under the rule of unanimity and too few under the more flexible rule of consent by two-thirds of the provinces comprising fifty per cent of the country's population. Whether one should accept the present proposed Formula in spite of this imperfection, because there is some greater good to be served by so doing, is a question to be discussed in Part III of this essay. The point now to be made is that, if we do decide to change the substance of what Part I of the Formula proposes, we should not throw out the technical baby with the substantial bath water. Those who say that Part I of the Fulton-Favreau Formula is an unnecessarily complex piece of drafting seem not to have understood that the complications genuinely reflect the difficulties of the problems being confronted. The meaning of the category 'constitutional law' is very complex and wide-ranging as a matter of systematic definition, hence any comprehensive scheme of amendment must have an appropriate range of distinctions linked to different procedures, if in this respect the law of the constitution is to meet the

needs of the country. In other words, a scheme that differs in important ways in substance from Part I of the Fulton-Favreau Formula is likely still to be just as complex in form. Indeed, if the new draftsman is as wise as the old one, the form will be much the same.

Earlier I stated the view that the Fulton-Favreau Formula puts too many constitutional matters under the rule of unanimity but that perhaps this imperfection should be accepted if some greater good can be served thereby. This relates to bringing the Canadian Constitution home, the subject of the next part of this essay.

III. The Present Position Respecting Amendment to the Constitution of Canada: How to Bring the Constitution Home.

The important part of our constitution respecting current issues of amendment and patriation is given in certain critical sections of the B.N.A. Acts.[9] The problems involved may be adequately considered if discussion here is confined to two types of constitutional matters; (1) the distribution of legislative powers between the Parliament of Canada and the legislatures of the provinces, and (2) some elements of the structure or composition of the Parliament of Canada. In these respects the old supremacy of the Imperial Parliament at Westminster has been formally preserved by Section 7 of the Statute of Westminster, 1931,[10] though the same statute declared the abolition of that supremacy in all other respects for Canada.

And even regarding the reserved matters of amendment, the preamble to the Statute of Westminster and the declarations by Imperial Conferences to which it refers plainly imply that complete autonomy was to be Canada's for the asking, if and when the various governments of federated Canada could agree among themselves on the necessary domestic procedures for such amendments. There has not yet been agreement, so we must ask - What is the present position?

After reviewing the procedures leading to amendments of the B.N.A. Act in the period 1867-1964, the White Paper summarizes the basic constitutional position in four propositions which may be briefly expressed as follows.(11)

(1) Although an Act of the United Kingdom Parliament is necessary to amend the B.N.A. Act, "such action is taken only upon formal request from Canada. No Act of the United Kingdom Parliament affecting Canada is therefore passed unless it is requested and consented to by Canada. Conversely, every amendment requested by Canada in the past has been enacted."

(2) The request must take the form of a joint address of the Canadian House of Commons and Senate to the Crown praying that the appropriate measure be laid before the Parliament of the United Kingdom.

(3) "The Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces."

(4) "No amendment to Canada's Constitution will be made by the British Parliament merely upon the request of a

Canadian province." The British Government will not move the British Parliament to act except on a request originating with the Federal Government of Canada.

Such is the existing method of constitutional amendment for matters still specially entrenched in the B.N.A. Acts. Thus we see that our present basic law of amendment has been made by long-standing official precedent, custom and practice modifying the constitutional law of the old British Empire in the manner just indicated. Anyone who doubts the validity and force of such custom, convention and practice should read again the preamble to the Statute of Westminster, 1931, which makes it clear that even that statute purports to be declaratory of a basic 'constitutional position' already 'established' by other means than statute - e.g. the agreed declarations or conventions of Imperial Conferences.

In any event, the result is that, in critical respects, amendment of the Canadian Constitution in the matters indicated consists in some steps that must be taken in Canada followed by others that must be taken in the United Kingdom. While the latter are purely formal now, nevertheless they represent a respect in which the Canadian Constitution is not now and never has been at home. Bringing it home then means to make into law a set of amending procedures that can be carried out in Canada entirely by Canadian governments, legislative bodies, or electorates, acting severally or in combinations of some kind. If we are to have legitimate as distinct from revolutionary change, then the present method of amendment focussed on London

should be followed one last time to institute a new domestic method for amendment focussed on Canada. Rules made by custom and convention seem already to have done as much as they can do to bring the Canadian Constitution home to Canada. What we now need is to acquire at one stroke a complete and precise set of domestic procedures for amending the Canadian Constitution. The slow and piece-meal development characteristic of custom and precedent as law-making processes is not now appropriate for this task. The only proper and legitimate way to obtain the complex scheme needed in one operation at the moment of our own choosing is by a statute of the United Kingdom Parliament enacted in response to the existing request and consent rules as the last statute for Canada of that Parliament. This would in effect repeal Section 7 of the Statute of Westminster and make Canadian legislative autonomy formally complete in the last area where up to this point it has been formally reserved. This is what successive Federal Governments at Ottawa have attempted to do by agreement with the provinces. This is what the Pearson Government has attempted to do with the Fulton-Favreau Formula. It should be noted that Section 10 of the Formula, the so-called renunciation clause (from the point of view of the Parliament of the United Kingdom), would terminate for all purposes the request and consent procedure as a means of putting British statutes into force in Canada.

This brings me to my basic point about the merit of the Fulton-Favreau Formula as a means of bringing the constitution home. It is true that the Formula is rigid in that it applies

the rule of unanimity to the whole range of the distribution of legislative powers between Parliament and the provincial legislatures. Nevertheless, we are under the rule of unanimity now in this respect by virtue of the existing request and consent rules. All we have to do to bring the constitution home is to substitute a domestic rule of unanimity for one focussed on London. If we are stuck with the rule of unanimity anyway for the present, and apparently we are, why not do this? It is embarrassing for the British and humiliating for Canadians to maintain any longer these obsolete and incongruous formal steps of requesting the British Parliament to act for us. Accordingly, my view is that we should use the Fulton-Favreau Formula as a means of bringing the constitution home. Then later, under the Formula, if we can get unanimous agreement, we can modify the scope of the Formula's rule of unanimity and place more matters under the rule permitting change by the concurrence with Parliament of at least two-thirds of the provinces comprising at least fifty per cent of the country's population.

The opponents of the Fulton-Favreau Formula as a means of bringing the constitution home make strange companions. On the one hand is a group who favour stronger powers at the centre for Parliament and who fear that the rule of unanimity would prevent this being brought about by amendment now or in the future even though the need for it was very great. On the other hand is a group, particularly strong in the Province of Quebec, who want greater powers assigned to the provinces, or at least to the Province of Quebec, and who fear that the rule of unanimity

would prevent such changes by amendment now or in the future. But, the point is that we are under the rule of unanimity anyway, and neither of these groups is worse off if the requirement is embodied in a domestic procedure rather than in one that takes us to London.

With all due respect to both groups of opponents of the Fulton-Favreau Formula, it does seem that some of them must be harbouring the hope that there might be circumstances in which they could persuade the British Government and Parliament to amend the Constitution of Canada respecting the distribution of legislative powers in disregard of the convention requiring unanimous consent of the provinces before the Canadian Parliament requests such an amendment. I do not think the present convention permits the British Government and British Parliament to override any provincial dissent in this type of constitutional matter. In the face of any provincial dissent, I think the present convention requires that the British Government and Parliament do nothing, simply regarding the request from the Canadian Parliament in these circumstances as improper, that is as unconstitutional or illegal. It would be an intolerable reversion to colonial status to suggest that the British Government or Parliament could be or should be involved in any substantial way in decision-making as to whether or not to modify the federal distribution of legislative powers in Canada. If they were asked to override provincial dissents in this type of matter, they would be substantially involved. To repeat, we should use the Fulton-Favreau Formula <u>as the means to bring the constitution home</u>. Once we

have it home on these terms, the Formula itself contains the procedures whereby its own undue rigidity could be modified if Canadians themselves could reach the point where the Parliament of Canada and the legislatures of the provinces were agreed about how to do it. If we cannot reach that point, we are going to have to rest upon the status quo anyway.

We may turn now to another point that should be made concerning the merit of the Fulton-Favreau Formula. So far, the argument has proceeded in relation to amendments or proposed amendments to the federal distribution of legislative powers. But there is another important type of amendment that has figured in federal-provincial relations. I refer to the composition of Parliament as an institution - as our central legislative body. For example an amendment of the B.N.A. Act was required to re-adjust representation in the House of Commons, that is to change the system whereby each province was given its quota of members in proportion to its population.(12) Between 1867 and 1949, such amendments were secured by an Act of the British Parliament in response to a joint address from the Canadian Parliament. As the convention developed in this class of matter, provincial consents were not necessary and the provinces were not consulted. In effect, then, a Federal Government at Ottawa could obtain this type of amendment by its own decisions alone. In 1949, without consulting the provinces, the Federal Government moved the Parliament of Canada to request an amendment of the B.N.A. Act which provided in effect that, in all cases appropriate for use of the joint address procedure without

provincial consent, changes in the Constitution of Canada could be made by an ordinary statute of the Parliament of Canada. The British Parliament passed the amendment as requested,(13) and a new class (1) of Section 91 of the B.N.A. Act was thereby enacted. It states that the legislative authority of the Parliament of Canada includes:

> The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

An example of the use of this new power occurred in 1952 when the Parliament of Canada enacted a statute providing a new section 51 of the B.N.A. Act respecting the provincial quotas by population for members in the House of Commons.(14) More than one provincial government had protested that the 1949 amendment went too far and that the provinces did have a real interest in the composition of the House of Commons and matters of like nature. Hence the provinces contended that the power of change should not rest with the Canadian Parliament alone. Prime Minister St. Laurent promised that, if the federal and

provincial governments could agree on over-all domestic amending procedures, federal powers in this respect could be re-written somewhat in an effort to meet the objections.(15) This was actually accomplished some years later in the Fulton-Favreau Formula produced by the Federal-Provincial Conferences of 1964. Section 12 of Part II of the Formula would repeal class (1) of Section 91 of the B.N.A. Act, as enacted in 1949, and substitute for it section 6 of Part I of the Formula. The latter section waters down very considerably the powers given the Parliament of Canada in 1949. For example, a change in "the principles of proportionate representation of the provinces in the House of Commons" would require under the Formula a statute of the Parliament of Canada followed by the concurrence of at least two-thirds of the provinces having at least fifty per cent of the population of the country. As stated earlier, the 1949 statutory powers of the Canadian Parliament were essentially the same as those the Canadian Parliament had between 1867 and 1949 by virtue of joint addresses not requiring consultation with the provinces. The substance of power and decision-making did not change in 1949, only the form of its exercise. Hence section 6 of the 1964 Formula does embody a reduction of federal power in relation to 1867 and 1949. It represents a major concession by the Federal Government to the provinces, no doubt in an effort to win their agreement to the over-all Formula. The Federal Government gets little credit for this from anyone, when in fact it deserves a great deal of credit for seeking to meet provincial complaints in this reasonable way.

Strangely enough though, Section 9 of Part I of the 1964 Formula seems designed to obscure what is really happening in this respect. Section 9 says:

> Nothing in this Part diminishes any power of the Parliament of Canada or of the legislature of a province, existing at the coming into force of this Act, to make laws in relation to any matter.

This is technically true of Part I of the Formula, but is not true of the over-all effect of the Formula as soon as one reads Section 12, the first section of Part II. (Section 12 repeals class (1) of Section 91 of the B.N.A. Act as enacted in 1949.) The White Paper carefully refrains from explaining that the combined effect of Sections 6 and 12 of the Formula is to negate section 9 of the Formula in this respect. Perhaps section 9 of the Formula is an attempt to placate the more extreme partisans of strong central power. If so, it doesn't quite come off. Anyway, Section 9 should simply be dropped from the Formula and Section 12 should be included in Part I where it belongs.

To recapitulate then, I am in favour of enactment of the Fulton-Favreau Formula now as the best means to bring the Constitution of Canada home. I am not opposed to considerable change in the substance of the Formula either now or later, as I have indicated, provided the necessary unanimous consent can be obtained now or later. Nevertheless, there is no prejudice to anyone in using the Formula as it stands as the means to bring the constitution home. This is clearly the best way, but it is not perhaps the only way in theory. Theoretically the device of a special constituent assembly could be used to bring the constitution home, and this will now be briefly examined.

A constituent assembly, as I understand it, would be an extraordinary representative body set up by the constitution and itself authorized to change the constitution by meeting prescribed conditions as to procedure and voting. Those who advocate such an assembly usually have in mind re-writing the Constitution of Canada in a major way. No doubt such a body could in theory be instituted for Canada if it were authorized by a statute of the British Parliament passed in response to a joint address of the Parliament of Canada in which all the provinces had concurred. This would be the only legitimate or constitutional way such an extraordinary body could be set up in Canada. If this were to be done, there would have to be prior federal-provincial agreement on a wide range of things. A number of questions would have to be answered about membership of the proposed constituent assembly, about how it was to proceed and what it could do. The following list of such questions is suggestive.

(1) Who would select and accredit delegates?

(2) Who would instruct delegates - what discretion would they have?

(3) What kind of a majority would be required to pass or adopt a proposed new constitutional clause at the assembly?

(4) Who would be bound by the passing of a clause in the assembly sessions?

(5) What ratifications, if any, would be required for clauses passed in the assembly sessions?

(6) Would a dissenting minority be bound by majority votes or majority ratifications?

Simply listing these problems means to me that a constituent assembly is simply not a practical possibility at this time. Nor would it be desirable if it were practical. We do not need a major re-writing of the Canadian Constitution at all. The existing constitution, as developed by judicial precedent and official practice, has served Canadians well for one hundred years and does not need wholesale change to continue to serve us well. On the other hand we must always be ready to study the need for certain particular changes by amendment here and there to meet the needs of new conditions. If a proper case for such change can be made in some specific respect, then we should give that change effect through the operation of a permanent and completely Canadian amending procedure like the Fulton-Favreau Formula - a procedure that arises naturally out of our history and traditions, and which uses our existing legislative and executive institutions of government. Public debate and discussion can take place in legislative and parliamentary sessions, before parliamentary committees, and in other ways congenial to our great inheritance of English parliamentary institutions and responsible government. There are for instance many types of conferences that could be held on constitutional issues. <u>These would not of course be constituent assemblies</u>, but rather gatherings designed to inform, to educate, to advise or to make recommendations. They would be concerned with helping to form public opinion and to reach significant consensus among

officials and citizens about specific items of desirable constitutional change. I agree with what the Prime Minister of Ontario, the Honourable Mr. Robarts, said recently on this subject in a public address to a group of businessmen in Montreal.(16)

> It also is time in our country that we sat down and examined, apart from the fiscal problems which have dominated discussions in recent years, some of the constitutional difficulties that arise from time to time. I have suggested a series of conferences at which we could meet together to discover and discuss areas of agreement and disagreement, of accommodation and of compromise, Province to Province. We would discuss not only constitutional questions but would explore the cultural and social problems of our changing world. I believe that much can be done to relieve the stresses and strains which have affected Canada without necessarily changing the British North America Act. If it is found that some sections should be changed, then let us change them; where no change is either desirable or necessary, let us leave it unaltered. I see no need for a new Constitution, only the possibility of some adjustments to a Constitution that can readily be amended to serve us well in the future.

I believe this pragmatic approach is the right one, and indeed the only practical one. This is the way to maintain a proper balance from time to time between constitutional stability and constitutional change, taking due account of the need for central power on the one hand and provincial automony on the other. So far as these adjustments call for specific contitutional amendments from time to time, we should be able to look to purely Canadian procedures appropriate for the purpose.

Footnotes

(1) (1965) Queen's Printer, Ottawa, hereinafter cited as the White Paper. The full text of the Fulton-Favreau Bill or Formula is given in Appendix 3 starting at page 110.

(2) Hans Kelsen, General Theory of Law and State (1949) Chapter X.

(3) Sir W. Ivor Jennings, The Law and the Constitution, 5th edition (1959) p. 33.

(4) Sections 1 and 2 of the Fulton-Favreau Formula.

(5) Sections 1, 5 and 6(g) of the Fulton-Favreau Formula.

(6) Section 7 of the Fulton-Favreau Formula.

(7) The White Paper, chapters II & III.

(8) Not all these arguments are convincing. For example, Section 2 of the Formula says that "No law...affecting any provision of the Constitution of Canada relating to...the powers of a legislature of a province to make laws...shall come into force unless it is concurred in by the legislatures of all the provinces." It has been argued that this means provincial legislative powers cannot be reduced without the unanimous concurrence of the provincial legislatures with the statute of Parliament concerned, whereas if provincial powers were being increased (and ipso facto federal powers reduced) this could be done by the concurrence with Parliament of the legislatures of only two-thirds of the provinces having at least fifty per cent of the country's population. The key word here is 'affecting', and I can see no reason for restricting the meaning of 'affecting' to 'reducing'. The

Footnotes (cont.)

(8) (Continued)

natural meaning of the word 'affecting' is 'making any change'. The corresponding word in the official French version is 'touchant', and the same comment applies. Personally I think the Formula is clear to the effect that, whether one is increasing federal legislative powers at the expense of the provinces, or increasing provincial legislative powers at the expense of the federal authority, there is only one way to do it. The rule of unanimity in Section 2 of the Formula must be followed. Either way you are 'affecting' provincial legislative powers. In any event, there may be re-arrangement of powers between the federal and provincial levels of government that could not easily be classified as increases for one or reductions for the other.

(9) See the White Paper, Appendix 1, starting at page 54 for 'A Consolidation of The British North America Acts, 1867 to 1964.'

(10) 22 George V, Chapter 4 (U.K.).

(11) The White Paper, p. 15-16.

(12) The White Paper, p. 13, items (8) and (9).

(13) See footnote (9).

(14) The B.N.A. Act, 1952, R.S.C. 1952, c.304.

(15) The White Paper, p. 25.

Footnotes (cont.)

(16) "Remarks by The Honourable John Robarts, Prime Minister of Ontario, To The Advertising And Sales Executives' Club of Montreal, Montreal, Wednesday, November 23rd, 1966." (Mimeographed text as released by the Office of the Prime Minister of Ontario).

The Making of Federal Constitutions:

A Study of Constitution-Making Processes in the United States, Australia, India, Pakistan, Malaysia, and the West Indies.

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Preface

I wish to acknowledge in particular the assistance given me during the course of my research by Professor R. L. Watts of Queen's University, and Dean W. R. Lederman of the Faculty of Law at Queen's. Professor Watts was kind enough to allow me the use of his highly informative doctoral thesis, and made the problem of compiling a bibliography for the Asian States and the West Indies a much more pleasant task than it would ordinarily have been. Dean Lederman has read the bulk of my work and, in spite of a busy schedule, has made invaluable criticism, as well as offering much encouragement.

Naturally, neither of these gentlemen bears any responsibility for the flaws or errors in my work, for which I alone am responsible.

The Making of Federal Constitutions

The making of a modern constitution is a complex procedure, involving close consideration of legal, political, social and economic questions. It is a process tempered by the hopes and aspirations of the people for whom the constitution shall be a supreme law, and, in the case of former colonial areas, by the wishes of the colonial master. This paper is a brief summary of longer papers done on each of the states involved, and will attempt to outline the processes of constitution-making in the United States, India, Pakistan, Australia, Malaysia and the West Indies. All the states involved are - or were, as in the case of the West Indies - federations, and all were faced with problems of regionalism, and cultural, religious or language differences, a fact which makes them particularly interesting from the point of view of Canadian experience.

A. The Political and Constitutional Background to Federal Constitution-Making

The states under discussion here all were at unique stages of constitutional development when they formed federal constitutions. The United States was alone in the group in that it was wholly independent, following the American Revolution, and full sovereignty rested solely in the hands of the American colonists. Federalism was not a new idea in American political thought,

some schemes dating back to the 1750's. The revolution naturally was a spur to constitutional growth, and in the late 1770's and early 1780's each of the "thirteen colonies" developed state constitutions. Interestingly, these were generally created by legislative bodies empowered by constituents to so act, and then submitted to voters for their approval. There was thus a real bias towards a compact theory of government and popular participation in constitution-making. On the national scale, the revolution transformed the continental congresses of 1774 and 1775 into a national government, which, in 1781, was regulated by the Articles of Confederation adopted in that year. The Articles created a confederation called the United States of America, with a congress, but no true executive. The central powers were limited to a vast degree - no doubt in reaction to the states' fear of central domination - and though the Articles stated that "Every state shall abide by the determinations of the united states in congress assembled..."[1], there was no sanction or any other force which could make this clause function, and thus the determinations of the central body were little more than recommendations. Defects were immediately seen, but attempts at amendment were side-tracked repeatedly. Movements to call a full-scale constitutional convention thus began to appear more frequently. In 1786, Virginia and Maryland invited several others to Annapolis to discuss commercial questions, but the convention emerged with a recommendation for a full constitutional convention at Philadelphia, "... to render the Constitution of the Federal

government adequate to the exigencies of the Union; and to report such an Act for that purpose to the United States in Congress Assembled, as when agreed to by them and afterwards confirmed by the legislatures of every State will effectually provide for the same".[2] This recommendation was sent to the Congress which, after some procrastination, did issue a call for a conference to be held in 1787. Thus in the brief period between the revolution and 1786, America was prepared to move from colonial status to limited co-operation and, finally to contemplate a more secure and adequate union. Much of this desire for unity came from problems of defence against foreign hostility, and hopes for better organization of the economic life of the country, particularly foreign trade and currency. This, compounded by what, even at this early date, could be called the American sense of destiny, led to the insistent but thoughtful emergence of men anxious to build a strong and united America. A spirit of change was in the air in the new nation, and unfettered by any legal or constitutional precedents it was bound to follow, it could - and did - move to create a constitution unique in history.

Thoughtful men also saw federation as a solution to the division of the Australian states, and attempts for it occurred as early as 1842. Of course, Australia was in a far different position than the United States. Britain was still the mother country and any constitutional changes were subject to British approval. Political maturity was at a high level in

Australia, however, so it can be safely said that the British aspect of the later constitution was more a formal legal requirement than true British participation in constitution-making. Not till the 1880's did economic or defense pressures become great enough to encourage positive steps at union. In 1883 there was created by British legislation a Federal Council of Australasia, "... to be a legislature merely, with no executive powers and no control over revenue or expenditures. And even its legislative powers were very scanty. "[3] This was much like America under the Articles. By 1890, pressure for closer union grew in Australia, and led to conferences, with delegates appointed by state legislatures, in 1890 and 1891. The latter conference became the basis of later constitutional discussions, and drew a bill followed closely in framing the 1901 constitution. By 1897, a full-scale constitutional conference was created, which produced the final constitution. As in America, then, though federation was an idea of long standing, the real movement leading to it took place in about a ten-year period. It is clear that as problems of defence and more complex internal and international economic relations grew, the idea of federation grew apace. Australia had a very large degree of self-government by this time, and the political traditions of Britain were of second nature to the country. The American model - and its success - were a real spur as well, so once federation became a politically advantageous solution, Australia leaders were prepared to move on their own to achieve full self-government.

A far different story than this leisurely development marks the history of India and Pakistan. The degree of self-government was less, and hostility to Great Britain was high, particularly by the two major political parties, the Congress Party (Hindu) and the Muslim League. Britain, by the end of World War II, was firmly committed to Indian independence, but most solutions she prepared were rejected out of hand by the Indian leaders. Not until 1946, when a British Cabinet Mission gave detailed proposals for Indians making their own constitutions was a solution in sight. In spite of attempts at compromise for Hindus and Muslims, these two elements of the Indian population could not be reconciled. The result, in 1947, was to give independence to two separate states, India and Pakistan, and the Constituent Assembly set up under the 1946 plan was split to become two constituent bodies, each to make a constitution for a wholly independent state. Because Britain granted independence before any constitution was made, she had no role to play in constitution-making, except in being the ultimate legal source under which the Assemblies were set up initially. Both new nations had been ruled by Britain for many years and a strong British tradition was imbued in their political life. Partition of course created new problems, and Pakistan, in particular, being a state created where none existed before, was left in a state of turmoil, without a well-established administration. Political awareness at the popular level was low and illiteracy prevented general participation in constitutional development. In Pakistan this led to the failure of the democratic system, while India, perhaps better prepared for independence,

managed to carry through quickly to a final constitutional solution.

Unlike the previously mentioned states, both Malaysia and the West Indies were not independent states to any large degree when they were federated. They were really Crown Colonies or protectorates, and thus Britain was not only a legal source of their constitutions, but played a major role in their formation. British Acts and Orders in Council created the states and brought their constitutions into effect, and greater degrees of independence followed federation. Thus Malaysia was federated in 1948, but got full independence only in 1957; and the West Indies, federated in 1958, got full internal self-government in 1960 and was dissolved in 1961 before full independence was achieved. In these states, federation was seen, especially by Britain, as a solution for economic and administrative backwardness, though the mother country was not ready, at federation, to grant full independence. There was a relatively political immaturity in both colonies, and a clear lack of enough capable local leaders. So the plan was to federate, and, in that framework, to gradually grant more and more independence.

B. Constitution-Making as an Amendment Process

In Malaya and the West Indies, constitutions were granted to federations which were not independent. Thus, on the road to independence, various amendments were made to the constitutions, usually by Order in Council in Britain, based on the requests of either the legislatures in the federations, or local constitutional

conferences. These amendments usually were but steps towards more complete self-government, adding to the electorate or giving a larger measure of cabinet government; and were clearly contemplated when the constitutions were promulgated.

In the United States, however, amendment played a large role in the creation of an entirely new constitution. When the Annapolis Convention of 1786 recommended a full constitutional convention, the recommendation was sent to the Congress to be implemented. When Congress, reacting to the temper of the times, issued a call for such a convention, it did so, however, "'for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal Constitution adequate to the exigencies of government and the preservation of the Union.'"[4] Clearly, then, the convention was to be a body advisory to Congress, and any changes it proposed were to be made in the framework of the amending procedure of the Articles. This procedure required that any alterations be agreed to by congress and by all the state legislatures; that is, unanimous consent by all states was necessary.

But the result of the convention was not merely a series of amendments to the old Articles, but an entirely new constitution, which would come into effect on being ratified by conventions in merely nine of the states, and would create a union of these nine who unanimously consented. Thus it is clear that the terms of reference of the convention were totally ignored by the constitution-makers. As R. L. Schuyler points out, "The

convention not only drafted a wholly new plan of government, but...it inserted in the constitution the provision that it should go into effect when ratified by nine states. Professor I. W. Burgess...has forcefully pointed out that what the convention 'actually did, stripped of all fiction and verbiage, was to assume constituent powers, ordain a constitution of government and liberty and demand a plebiscite thereon over the heads of all existing legally organized powers.'"[5] The entire constitution, then, meant as an amendment to the Articles, emerged as a wholly new instrument of government. This in itself sets apart the American experience from all others and marks a revolutionary type of step in constitution-making. The key point of course is that the amendment procedure required acceptance by all the states, while the new formula needed only nine of the thirteen states to ratify to make the constitution operative for those so ratifying. It is clear, then, that far from following its terms of reference, the American constitution-making body went far beyond these bounds and gave to the nation a new constitution to be based on a new legal source.

C. The Use of Committees of Inquiry, Commissions and Conferences in the Period Before Final Constitution-Making

A favourite device, used particularly by Britain in granting constitutions, has been the employment of investigating commissions or conferences, which run the range from analyzing particular thorny problems in a constitution to proposing entire

schemes of economic, social and constitutional development. The United States used such conferences least of all in the time preceding its constituent assembly, but even there the Annapolis Convention of 1786 was a conference - ostensibly for trade negotiations - which led to the calling of a full-scale conference. But the device is primarily a pre-constitution method by which a colonial master can examine the desires of the colony and in that way reach conclusions upon which to build a constitution. As a rule, the more independent the state to receive the constitution, the less the mother country tends to participate in such investigatory procedings. In Australia, for example, the Australasian convention of 1883 was primarily a local movement, and led to British legislation creating the Federal Council of 1885. So too were the Conventions of 1890 and 1891 locally inspired, and the latter attempted to assume the role of an Australian constitutional conference. Delegates were appointed by the local legislatures, and the entire 1891 meeting was the basis of the constituent assembly of 1897.

Investigatory conventions were much more important in India and Pakistan than in more highly developed Australia. When it became clear to Britain that the limited government of the 1935 constitution was unsatisfactory to Indians, and that the Indians demanded full, not merely primary, responsibility for their new constitution, a mission (the Cripps Mission) was sent out in 1942. It emerged with a new draft plan for India, after much discussion, whose chief recommendation was that after the war, an elected constitution-making body would be

created for India. As the plan was not generally accepted, in 1946 there was a British Cabinet Mission which created a highly detailed constitutional framework. It had intended to make its recommendations primarily on whatever compromises could be reached between Hindus and Moslems, but as this agreement was not forthcoming, the Mission made its own suggestions. This was a deviation from the usual procedure for commissions, which usually were scrupulously careful to base their reports on local wishes. In India, a conflict of the major groups made a consensus almost impossible to achieve, so the Mission attempted to make its own compromise as to the constitutional machinery to be set up. Indeed, the Mission's success in this is shown by the fact that the Constituent Assembly finally set up was along the plan created by the Mission.

The usual pattern for pre-constitution conferences or commissions was somewhat different from these Indian examples. Whether held locally or in London, ...the British Government generally attempted to include at these conferences the leaders of the major nationalist political parties in the territories involved, even when they were unrepresented in the local colonial government, because until they were present to work out compromises amongst themselves, the solutions of the conferences were of little efficacy. Secondly, the British Government has usually tried to create a situation where those involved felt that they were really bargaining, working out a 'social contract' and not merely participating in a talking shop.[6] For this reason, the debates are usually private, and the conflicts thus have a

much better chance to be resolved. The public eye - particularly if delegates are also politicians - would have a definite dampening effect on honest discussion of all the issues. Britain, of course, as the legal sovereign and dominant member, has had to tread the narrow line between mere participation and domination, and even if she has restrained her influence it can be seen in the institutions adapted in new federal constitutions.

In Malaya, when local protest against the 1946 constitution imposed by Britain grew, the colonial office invited the Malay Rulers and major Malay political leaders to join to work out a more acceptable constitution, the British stipulating, however, that whatever new constitution was prepared would have to provide for a strong central government. The working committee set up at this time submitted its proposals to Chinese and other non-Malay groups for amendment, and finally a scheme emerged which, approved by Britain, led to the legislation and agreements creating the federation of 1948. This was not full self-government, so the next steps also were by conferences and commissions. In 1956, a constitutional revision conference was called for London at which British representatives met with the political leaders of Malaya and the representatives of the Sultans. The conference appointed a Commission (Reid Commission) to "make recommendations for a federal form of constitution for the whole country as a single, independent, self-governing unit within the Commonwealth based on parliamentary democracy with a bicameral legislature...".[7] The Commission was composed of 2 Englishmen, and one man each

from India, Australia and Pakistan. It received memoranda from interested groups, and its report and draft constitutions, after revision by a Working Committee representing Britain, the Sultans and the federation government, led to the creation of an independent Malaya in 1957. As Singapore and the Borneo territories came closer to merger with the federation, similar steps were taken. A Malaysia Solidarity Committee was established representing all the territories, and the Cobbold Commission set up to examine Borneo's accession. (Singapore agreed to join by intergovernmental consultation, and no general conference was called). The Cobbold report set up a detailed scheme for the addition of the Borneo group and it - after examination by an intergovernmental committee composed of British, Malayan and Bornean representatives - was the basis for the creation of Malaysia for the Borneo territories, excluding Brunei, which did not immediately wish to join.

In the West Indies, commissions were even more prominent than elsewhere, and most were created by British pressure, for in this area Britain perhaps wished for federation even more than the local populace desired it. In 1938, the Moyne Commission, sent to investigate West Indian social and economic conditions, recommended more West Indian involvement in government. Conferences also led to the eventual gaining of self-government by Jamaica and Trinidad. As far as the federation is concerned, the entire history of its creation is a series of conferences. At Montego Bay in 1947, all the colonies were represented by delegates chosen by their

respective legislatures. The conference created the Standing Closer Association Committee (SCAS), composed of West Indians chosen by the local legislatures, and a chairman and secretary appointed by the British Colonial Secretary, which was to examine tariff and fiscal problems, as well as the details of a federal constitution. The SCAC report (known as the Rance Report), which recommended a sort of advanced Crown Colony federation, was accepted by all the island Carribean legislatures and was the basis for later development. The next step, also at the initiative of Britain, was a conference in 1953, which expanded the Rance report. This was followed in London by another conference, in 1956, which hammered out final solutions as far as possible. This conference appointed a Standing Federation Committee, which, as a "prefederal executive", did detailed organization preparatory to federation. Once this was done, federation became a matter of appropriate legislation. Once the federation was formed, and as a requirement of the constitution, further conferences were held on the road to full independence, an event which dissolution of the federation prevented.

In general, then, the pattern in colonial nations has been for the Secretary of State for the colonies to send out a commission or committee to inquire and to prepare a report, as was done by the Reid and Cobbold Commissions in Malaya, and the Cabinet Mission in India. If the changes proposed are basic, they have been settled in conferences in London, the results being discussed by local committees, and legislatures before a finished set of constitutional proposals

becomes the basis for legislation. The commission method can of course be used internally by a federal state, with each local unit appointing members to a general conference which can reach broad agreement and then have the details completed by committees, all subject to the final approval of the unit governments. Especially if the conferences are private can the method be seen as suitable, and if joined with independent investigatory commissions can provide a wide survey of feelings for adapting or changing a federal scheme. An example of this somewhat different type of commission is that used by Pakistan after the failure of its Constituent Assembly and the establishment of martial law in that nation in 1958. Under the President, there was neither an elected legislature nor a constituent assembly, so under a mandate given him, by a presidential referendum in 1960, authorizing the preparation of a new constitution, Ayub Khan appointed the Constitution Commission of Pakistan. It was to examine the previous failures in government and to recommend a new constitution. It operated much as a royal commission, sending out highly detailed questionnaires and interviewing prominent authorities. Its investigation probed all areas from the type of government (federal or unitary) preferred, to the question of the role of Islam in the state. It was not bound by popular recommendations to it in proposing final solutions, nor was the President bound by the findings of the Commission. There was - unlike other states mentioned here - no democratic sanction behind the recommendations, but the Commission operated by relatively the same procedures as did British (Colonial conferences or committees, that is) as a fact-finding body empowered to propose solutions. The constitution

which emerged, after study by another commission and approval by the President, thus still can be said to follow the general pattern of all conference or commission-created constitutions.

D. Creation of Constitutions by Legislation and Order In Council

In Australia, Malaya and the West Indies, British legislation was necessary before the constitutions decided on at conferences could be implemented. It is an elemental fact that this had to occur, because sovereignty rested not in local hands, but with the British Parliament. In Australia, once the constituent assembly (to be discussed later) had decided on the constitution, there was to be an address to the Crown to enact it. Australian delegates presented it in London, and, after some discussion a Bill was passed creating the Commonwealth of Australia under the new constitution. This fact makes the Australian document unique, for though it was created by the people through a local assembly, the nation it governs is a creation of law from outside. Moore points out that "the establishment of the Commonwealth is no 'act of state', transcending the limits of legal inquiry; it is an act of law performed under the authority of the acknowledged political superior. The constitution is first and foremost a law declared by the Imperial Parliament to be 'binding on the Courts, Judges and people of every State and of every part of the Commonwealth'". [8] Unlike the United States, then, Australia is not completely a creation of the Australian people.

Malaya, though it too had to look to Britain for legal sanction of its new federal status, was in a slightly different

position than Australia. The local Malay Sultans were still possessed of sovereignty to some extent, a fact reflected in the 1948 Federation of Malaya Agreement. This agreement between the Sultans and the British Crown brought the Constitution into effect, and as Mills says, "it emphasized that the Sultans were the legal source of authority and that the new constitution was not imposed upon them, but was drawn up with their consent."[9] In so far as Penang and Malacca, two wholly British-controlled areas, were concerned, no agreement was necessary, and a British order in council - the Federation of Malaya Order in Council, 1948 - made them members of the federation. After the Reid Commission Report of 1957 and the creation of a new draft constitution, three legal steps were necessary to give independence. In Britain, there was the Federation of Malaya Independence Act, 1957 (and orders in council under it) which was conditional on approval of the new constitution in Malaya, and which approved the conclusion of an agreement between all the Rulers for independence. If such an agreement was reached, and approval given, Britain would by order in council make the new federal and state constitutions operative for those settlements still under the protection of the Queen. (The Federation of Malaya, Independence Order in Council, 1957, did this.) The British Act was purely national; the Federation of Malaya Agreement, 1957, was an international legal document. As the Queen still had sovereignty, this agreement was needed to replace those of 1948. It had not only to declare the new federation, but also record that British sovereignty and authority in the entire federation had ended.

It was made between the British Crown, the new constitutional Monarch of Malaya, and the Rulers of the Malay States. In schedules to the agreement were all the new state and federal constitutions, and it too was conditional on approval by enactments on both the federal and state levels in Malaya. This third step was taken by the federation itself, in the Federal Constitution Ordinance, 1957, and by state enactments in the Malay States. By then the new federation was established. When Malaya finally became Malaysia, it was by another agreement - the Malaysia Act - between the Malayan government and Britain, which transferred sovereignty of the Borneo territories and Singapore to the expanded federation. It followed on legislation in each nation and approval by the territories joining Malaysia.

The West Indies too depended on British legislation to create it. The Rance Report of 1949 had advocated creation of the federation by Order in Council under an Act, and that later amendments - as steps to independence - also be by order in council. The federation created in 1957 followed this plan, which had become a standard procedure, being used in Rhodesia and Nyasaland previously. The first step was the British Carribean Federation Act, 1956, which provided for a federation of the West Indies. The constitution was given by the West Indies (Federation) Order in Council, 1957, made under the 1956 Act. Britain retained the right to legislate by Order in Council regarding defense, external relations and certain financial aspects of the federation.

The above processes seem simple enough, but indeed embody much of the proper legal approach to constitution-making. A constituent assembly, wholly independent to promulgate a constitution, was not the solution in any of the nations mentioned, unless independence was granted prior to the decisions of such assembly. Also, mere local legislation would not be enough, for generally it is beyond the power of a colonial legislature either to put an end to its own existence or to divest itself of its inherent or acquired powers. Finally, a mere Order in Council was not sufficient, as Britain did not always have full prerogative rights over the units to be federated. Thus the solutions had to be either an Act (as in Australia and Malaya) or an Order in Council under an Act (as in the West Indies and part of Malaya).

It is interesting to note that the Order in Council method suggested in the West Indies, with future amendment by Order as well, re-introduces a Canadian problem, that is, having amendment power in the hands of a power outside the federation. S. S. Ramphal, in analyzing the problems this may create, says, "Unfortunately the circle is a vicious one, for the remedy lies in an amendment of the constitution while the malady itself results from the lack of satisfactory machinery for amendment. The experience of Canada offers the very strongest argument for establishing, at the outset, specific machinery for constitutional amendment located in the federal nation. The existence of such machinery does not, of course, deprive the Imperial Parliament of its authority to legislate for the Federation, but it does relieve it of a constitutional

role for which it could have little relish."[10] Naturally, this example has been the one most avoided by copyists of the Canadian federal scheme.

E. The Constituent Assembly as a Constitution-Making Device.

Perhaps the most appealing method of constitution-making to the democratically inclined observer is the use of a constituent assembly, a body designed solely or partly to create a constitution. Generally, such a body not only drafts the constitution but also has the power in some way to implement it, though Australia is an exception here, in that the legal source of the constitution came not from the assembly but from Britain.

The earliest and perhaps the most prominent use of a constituent assembly was in the United States. When Congress gave its approval for a 1787 convention in Philadelphia - ostensibly to amend the Articles of Confederation - the states began immediately to organize their delegations. All the delegates were chosen by the state legislatures, and thus the convention was really a gathering of the states. Procedure was thus also based on the idea of state representation, "...each state having one vote, seven states making a quorum, and a majority of states present being competent to decide all questions, though the deputies of a state by simply requesting it might postpone the vote upon any question until the following day."[11] After electing Washington as presiding

officer, the convention settled into an organized and highly interesting framework. In the preliminary stage, there was given the report of the Committee on rules, which was set up immediately to settle procedural problems, and the presentation of a plan for an entirely new constitution by the Virginia delegation. The convention then became a committee of the whole, and after hearing a New Jersey plan which was more along the lines of amending the Articles, voted in favour of the Virginia plan. So at this very early stage, the convention was already committing itself to becoming a full constituent assembly rather than a mere amending body.

After this, the general convention began its discussion of the report of the committee of the whole. In this stage was reached the so-called "Great Compromise" on equal representation in the Upper House (Senate) for all states, and general resolutions were made concerning the executive, judiciary and ratification processes. This done, the convention appointed a committee of detail to draw up a constitution conforming to the general resolutions. As this committee worked, the convention took a general recess, and then reconvened to discuss the final report. When the report was given a committee on unfinished parts was appointed to cover areas not satisfactorily dealt with or to make changes recommended by the general body, and a committee on style polished the final recommendations. The general convention then reviewed the final draft, added a few final touches and then adjourned sine die, to await ratification. In the American system, then, the Constituent Assembly stands at

the apex, for it was this body which created the instrument which became the supreme law of the land.

Australia too used an assembly to create its constitution, though of course, legally, the real power of constitution-making lay with Britain. Such a procedure had precedents in Australian experience. In 1891, the Sydney Convention, with delegates appointed by state legislatures, met "...to consider and report upon an adequate scheme for a Federal Constitution."[12] The convention passed a series of general resolutions as to the type of government and institutions desired, and then referred them to committees which were to draft a constitution. Unfortunately, the draft bill produced here was left to languish by the inaction of the states. But the 1891 convention not only was the beginning of detailed work for a constitution, but also the framework which the final convention decided to follow. In the following years public support for a popularly elected convention grew, and the 1895 Premiers Conference recommended a convention composed of 10 popularly elected delegates from each of the states. This conference also recommended that the constituent assembly, "...after framing a draft Constitution, should adjourn for a period of not less than thirty and not more than sixty days, and that it should then reassemble, reconsider the Constitution with any amendments that might be proposed, and finally adopt it with any amendments that might be agreed to."[13] The local legislatures passed enabling legislation and set up the convention, and by 1897 delegates were elected in five

of the six states (Queensland could not agree on the entire question, so was not represented at the convention).

It was clear at the outset that there was to be a new bill, not merely revision of the 1891 draft. But the 1891 procedure was closely followed. A drafting committee of one proposed resolutions and these were debated by the entire convention and adopted by the committee of the whole without detailed consideration. Then the resolutions were passed on to three committees instructed to draft a constitution. As in 1891, the financial and judiciary committees were to report to the Committee on Constitutional Machinery, and finally, the complete report was to go to a drafting committee which was to give effective voice to the decisions of the committees. Interestingly, all the committee sessions were kept secret (as was the entire American convention) so that the public was unaware of the conflicts and compromises which were a part of the final draft. This draft, on completion, was re-submitted to the committee of the whole for more discussion, and then the convention adjourning to allow the state legislatures to discuss the new constitution.

The bill, with proposed amendments, came back to the convention in the fall of 1897, and details were hashed over then, and at a final session in early 1898, at which the bill was re-submitted to committees to rewrite certain clauses. Finally, the convention adopted the bill and submitted it to the states, where the ratification procedure would begin. After an initial failure to ratify, the bill was changed and

finally ratified, and then sent on to England.

Clearly, Australia in many ways followed the American model, both in the type of constitution produced and in the procedure used to create it. The elements of secrecy, the work of details being done in committee, and the use of recess, seem to closely imitate America, a clear indication of the advanced technique the United States had created as early as 1787.

A far more stormy tale is that of the Constituent Assemblies of India and Pakistan. The Cabinet Mission of 1946 laid down the framework for an assembly. It felt that election of that body by universal adult suffrage would cause confusion and delay, so settled on a method whereby each province would be allotted seats in the assembly according to population, in the ratio of about one representative per one million of population. Further, each province's seats would be divided among the three main communities (Muslim, Sikh and Hindu) and then the members of each community in the provincial legislature would elect its allocated number of representatives. The Mission suggested that after a preliminary meeting, the provincial representatives would divide into three predetermined groups, settle provincial constitutions and a group constitution if they wished one. Then all the members would once again meet and draw up an overall union constitution. There was also to be an advisory committee on the rights of citizens, minorities and tribes, who were not represented in the Assembly; and the Princely States were to get representatives, also on a population basis, on a formula to be settled by the Assembly and these states.

In summer 1946 a Constituent Assembly Office was established to suggest procedures for the newly-elected body to follow. For example, Sir Benegal Rau, the Constitutional advisor, said the first step would be the election of a chairman, followed by the appointment of a committee to draft procedural rules, as was done in America in 1787. There was to be a steering committee to draft resolutions (which Rau equated to the Quebec Conference in Canada) and the election of committees on finance, minorities and to negotiate with the Princely States. When The Assembly met in December, 1946, the Muslim League members did not attend, so the Working Committee began to act without them, and its resolutions in many ways tried to placate Muslim hostility. Two committees were also set up, one to deal with minority rights, the other to examine Foreign Affairs, Defence, Communications and Finance. By the 3rd session of the assembly, hopes of appeasing the Muslims faded, and the new resolutions passed by the group, aiming at strong central government, reflected acceptance of partition, as such centrist bias could only alienate the states-rights Muslims.

Finally, partition was agreed upon, by both Britain and the states involved, and in 1947, the Indian Independence Bill created two new Dominion, India and Pakistan, each to have a constituent assembly which would also act as an interim legislature. The already composed Indian assembly continued to meet and quite quickly produced a new constitution. Chronologically, the development was as follows. In early 1947,

the Advisory Committee had sent out a highly detailed questionnaire to members of local legislatures covering every possible aspect of a new governmental framework, with copious examples from the procedures in England, America, Canada, and Australia, as well as other non-British federations. In fall of 1947 the Assembly's Drafting Committee set to work, using much of the material gathered in the questionnaire as well as doing its own comparative study of other constitutions. After a draft was prepared, the Assembly, as in Australia, adjourned to give the nation a chance to examine its proposals. When it reassembled it considered 2,000 proposed amendments (as many as 7,600 had been suggested) and finally passed the completed document in the form of a legislative bill.

It should be pointed out that much of the detail work in India was done by the committees and by the leaders of the Congress Party. The Assembly as a whole did little to modify party or committee recommendations, a fact which helps explain why the constitution so closely reflects Congress Party views on the composition of government.

Pakistan was given the same basic constitutional machinery as was India. Its new Constituent Assembly, also to be an interim legislature, was set up on the basis of one representative per one million population, chosen by the provincial legislatures. Adjustments were made from the original elections in 1946 to compensate for population shifts, and to accommodate tribal areas and princely states. In theory the assembly was a highly independent body, summoned and prorogued by its own president, and with the power of making its

enactments law on being signed by the assembly president and published in the Gazette of Pakistan. In practice, as in India, the key decisions were made by provincial ministers and the Muslim League Parliamentary party.

The Assembly quickly established a Basic Principles Committee and three strong sub-committees, dealing with Federal and Provincial constitutions and the distribution of power; the Franchise; and the Judiciary. The sub-committees were to report to the Basic Principles Committee, which would amend and approve their reports and send on a full Interim Report to the Assembly. In the Assembly, a Committee on Suggestions would discuss and amend the Committee's report. Two reports - in 1950 and 1952 - were rejected in the House. When the report was finally adopted in 1954, along with a report by the Committee on Fundamental Rights, and then sent to a Drafting Committee, no new constitution could be drawn up, as the Governor-General dissolved the Assembly on the grounds that it had become unrepresentative.

After the Federal Court ruled that there had to be a constituent assembly, under the Indian Independence Act, elections were held for a new body in June, 1955. Election was once again indirect, by the provincial legislatures, but no longer on a population basis. Now the formula was to be on the basis of regional representation. As well, the new Assembly was to have its legislative functions suspended until a constitution was made. Procedures were also drastically changed. The Assembly was not to set up drafting machinery, and instead, the government decided to prepare its own draft, which was presented

by the Law Minister. After relatively brief debate (2 months) the Assembly passed the draft and Pakistan had its first constitution since independence. Of course, the military take-over under Ayub Khan destroyed this 1956 Constitution, and the later Pakistani constitution was made by a Constitutional Commission, whose work has been discussed previously.

In general, then, certain procedures seem to mark the rise of Constituent Assemblies. The pattern seems to be to create a general set of resolutions, refer them to committees for detail work, and then have a drafting committee draw up a constitution. This is often submitted to the country as a whole, or to legislatures, for discussion, and then the assembly makes its final changes and adopts the document, usually leaving only ratification to bring the constitution into effect.

F. The Use of Referenda; and the Ratification of Constitutions

The use of a referendum or plebiscite has been one of the devices common in constitution-making, either in ratification of a constitution, or to get popular approval before a constitution is framed, or even, as in the West Indies, to spur dissolution of a federation. In the United States alone of the states discussed here was there no use of any form of referendum at any stage of constitutional development.

As a pre-constitutional device, the referendum was used in India, Pakistan and Malaya. When the question arose as to

partition of India and Pakistan, the decision was left to the states which would be involved, and in one, North-West Frontier Province, there would be a referendum of all electors to the local Assembly (In the other states the decision was up to the local legislatures or chiefs). And in 1960, in Pakistan, there was a presidential referendum, which confirmed Ayub Khan in office and authorized him to prepare a new constitution, a mandate which led to the Constitutional Commission of 1960 and the resultant presidential constitution.

In Malaysia, the referendum had a different role. When Singapore was going to join the federation (which she suddenly, has withdrawn from on August 9, 1965), an agreement between the Malayan and Singapore Prime Ministers as to merger proposed using a referendum to test Singapore's feeling in the matter. The referendum was unusual in that there was no negative vote possible in the question of merger. The only alternatives were three positive votes for different schemes of merger. As a result, the scheme approved by an overwhelming majority was the one already agreed to by the Malayan and Singapore governments.

At the other end of the scale, the referendum was the device which began the collapse of the West Indies federation. In Jamaica, strong opposition to the federation grew after 1960, and the Jamaican government, in response to this, said the position of the nation in the federation, or, indeed, if it was to remain in the federation, would be decided by referendum. In September, 1961, the referendum was held and a substantial

majority of the votes favoured secession from the union. Once the result was accepted by the Jamaican authorities and by Britain, disintegration was assured, for the Trinidad and Tobago government quickly resolved to also withdraw and the federation came to a sudden end before it had even achieved independence.

The area of ratification, which lends itself to numerous methods of approach, also has examples of the use of a referendum, most notably in Australia. Under the enabling legislation which established the constituent assembly, the constitution was to be submitted to the electors to be accepted or rejected by a vote. If accepted by the voters of three or more colonies the constitution could be submitted to England with a request for the requisite legislation. In 1898, the first referendum was held, but New South Wales refused the constitution. As it was a key state, the constitution was not sent on to England, for though three other states had approved, an Australia without New South Wales was politically unfeasible. After conciliatory amendments were made at a Premiers Conference, the bill was again submitted to a referendum, where it was passed by all five states voting, and sent on to England, where legislation brought it into effect. Thus ratification in Australia did not have the legal effect of bringing the constitution into effect, but merely opened the door for the final legislative step which would occur outside Australia.

In India and Pakistan, under the Constituent Assemblies, there was no element of public approval necessary

to bring constitutions into being. The Assemblies were sovereign bodies, empowered to create constitutions by the British Act under which they were created. Once the constitution was passed, just as a legislative bill, after three readings, the assembly would declare it in effect. The consent of the states was really obtained initially, in their acceptance of and participation in the assemblies. Truly, the legal bases of these assembly-made constitutions were the assemblies themselves, which, using their own powers, enacted, ordained and adopted the constitutions involved, that of India in 1949 and Pakistan in 1956.

The present Pakistani Constitution also had no general ratification, and came into effect after approval by the President and his executive. Of course, as no representative assembly existed in Pakistan at this time, there was little chance to obtain wide public approval.

In both Malaya and the West Indies, part at least of the legal source of the constitution lay in the hands of Britain. In Malaya, in 1948, federation was created by an agreement between the sovereign authorities (Britain's king and the Malay Rulers), and by British order in council. Further changes were based on committee reports, and with agreement by Britain and the Malay Rulers. To create the 1957 independent federation, legislation by Britain, the Malayan Federal Government and the local states was needed, as well as another agreement between the sovereigns. When the Malaysian Federation was created, the constitutions were put into effect by resolutions in Borneo, and

Brunei (which decided later not to join) and agreement after a referendum in Singapore, all followed by an agreement signed by all parties. Once this occurred Malaya and Britain passed legislation transferring sovereignty to Malaysia. Thus local approval occurred only through the legislatures or the local rulers, and the final step to create the constitution was not with local participation, but rather, by legislation of the only two sovereigns involved.

The West Indies also had no official ratification procedure, as Britain passed the necessary legislation after local agreement was reached.

But in the United States, full democratic participation marked all constitutional development. The ratification procedure was that in each state the electors should elect conventions to consider and ratify the constitution. Once nine states had so ratified the constitution would be in effect for those states ratifying. As Australia did later, America required unanimous consent of the ratifiers to make the constitution operative, even though fewer than the full number of states involved could bring a new nation under a new document into being. One reason ratification by state legislatures was avoided was to prevent later legislations withdrawing consent. The framers felt that a resort to the people was a resort to the ultimate source of authority in a nation. The American draft bill was sent to the Congress, which did not itself pass on the document, and avoided facing the issue of how far the convention had gone from its terms of reference.

After considerable debate - which led to the addition of the Bill of Rights as the original amendments - the state conventions did ratify and a new nation was brought into being by summer of 1788.

It can safely be said that the United States, by virtue of its real independence, most consistently involved the people of the land in its constitutional formation. Their legislators appointed the convention delegates, and then they themselves brought the constitution into effect through specially elected conventions. Perhaps Australia, by using a referendum, involved the public even more but of course in Australia the constitution still, legally, was implemented by Britain and not within Australia.

G. Conclusions.

The process of constitution-making clearly can follow many paths, and no solutions are easy. Pakistan was created out of religious conflict, and it was only after the failure of its democratic institutions that it had a viable constitution, though one created by the edict of a semi-dictatorial president. The West Indies has collapsed as a federation, primarily because its constitution, designed to placate dissident local elements, was too weak to support any federal government, particularly on the financial and commercial levels. And Malaysia, beset with conflicts between Chinese and Malays, has just recently (August 9, 1965) lost Singapore as a member state. The other states here discussed -

the United States, Australia and India - all reached constitutional success more easily than the others, though in each conflicts threatened to prevent solution for a time.

But in each nation it is clear that, in some way, the public must become involved in the constitutional process. This can be done, as in highly sophisticated states such as America or Australia, by participation in referenda or in forming constitutional conventions, or as in India by a combination of colonial conferences and direction by Britain with local election of a constituent assembly. In the least developed colonies, participation has been less intimate, but has been assured by having local leaders, not only politicians, draw the shape of their own destinies as far as possible through conferences and committees. And even here the commissions of inquiry set up have often touched popular feeling outside the scope of any conference.

Thus in some way the people help create their own governing instrument, a result which, for the democratically inclined, is surely the only reasonable one.

FOOTNOTES

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6. R.J. Watts, Recent Experiments in Federalism in Commonwealth Countries, A Comparative Analysis, Doctoral thesis submitted to the Board of the Faculty of Social Studies of Oxford University, Trinity Term, 1962, p. 348-49.

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13. Quick & Garran, op. cit., p. 159.

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C. Australia

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4. S.S. Ramphal, "Federal Constitution-Making in the British West Indies," The International and Comparative Law Quarterly, Vol. 2, Part 2, April 1953. (London, 1953)

   (This article is interesting for its detailed analysis of the various procedures a "colonial master" such as Britain could adopt in granting a constitution, and the legal implications of each.)

The Provinces and International Agreements

by Mr. Justice Bora Laskin

Mr. Justice Laskin was a Professor of Law at the University of Toronto when appointed to the Ontario Advisory Committee on Confederation on its formation in February, 1965. He resigned his position on his appointment to the Ontario Court of Appeals.

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The Provinces and International Agreements

The distribution of governmental powers in a federal state cannot be complete without reference in its Constitution to foreign affairs. Normally, the exercise of authority in relation to foreign affairs has two aspects: first, there is the executive power of direct dealing with foreign states, involving an internal determination of where that executive power resides and an external determination of international status or personality; and, second, there is the legislative power of implementing domestically, if need be, the international accord, a matter which in itself has no international significance save as it is expressly dealt with in the international contract. The legislative power of implementation raises, however, an internal domestic issue which, shortly stated, is whether a federal state must be governed in its international relationships by the distributive character of its constitutional organization. Ordinarily, it would be expected that this issue (as, indeed, the question of executive power to engage in international relations) would be settled by the basic Constitution or, if not clearly settled thereby, would be resolved by the decisions of the highest Court competent to bind the central and unit governments of the federation by its judgements.

In considering how these matters stand in Canada, two long-established constitutional doctrines provide a

relevant background. First, the distribution of legislative power between Parliament and the provincial legislatures involves a correlative distribution of the accompanying executive or prerogative power. (The formal exercise of these executive or prerogative powers, at the federal level by the Queen or by the Governor-General and at the provincial level by the Lieutenant-Governor in the name of the Queen, must, of course, be seen practically in the context of the conventions of responsible government.) Second, the British North America Act exhausts the whole range of legislative power (or, the totality of effective legislative power, to use a more recent judicial exposition of the principle) and, subject to express or implied limitations in the Act, whatever is not given to the provincial legislatures rests with Parliament. (On the question of limitations, see Laskin, Canadian Constitutional Law, 3rd ed., pp.70 ff.). The application of these doctrines to foreign affairs in general, or to international agreements in particular, means that the executive power in relation thereto is a concomitant of the legislative power; and that unless it is unqualifiedly found in the catalogue of provincial legislative powers, the matter is within exclusive federal competence. Is this in fact the case under the Constitution and the judicial decisions which have dealt with foreign affairs and international agreements?

II

British colonial history and law show clearly that a grant of legislative power to implement domestically the obligations undertaken in international negotiations is not necessarily a concession of international status. Thus, from the standpoint of Great Britain's exclusive representation of her colonies abroad, there was nothing incongruous in granting power to a colonial legislature to carry into effect by local legislation the international commitments made by Great Britain on behalf of the local colonial government. Recognition of international personality or status would, however, be involved if a colony were given the power of negotiating international agreements without reference to Great Britain (that is, to the British Government).

The Canadian Constitution, unlike the later Australian one, makes no reference to foreign or external affairs. They are touched upon only in the now obsolete section 132 which reads as follows: "The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries." The section is obsolete because Great Britain (or to use the formal name, the Crown in right of the United Kingdom) no longer makes treaties or any other kind of international agreement for Canada or any Province thereof, and it is unreal to expect the Courts to apply section 132 in the present

circumstance of Canada's undoubted independent international status; the language of the section is beyond any such redemption. It is important, however, to notice the reference in the section to the Provinces. It underlined that at a time when the central government of Canada had no executive power to conduct foreign relations for itself or any of the units, the British Government might do so, but whether it was Canada as a whole or any Province that was affected, the necessary legislative and executive powers to discharge the obligation rested with the central authorities in Canada. For this purpose, it was immaterial that the obligations involved matters that would otherwise have been within exclusive provincial legislative (and executive) competence. So-called "treaty" legislation under section 132 could be enacted only by the Parliament of Canada.

If the Provinces at 1867 and later had no executive power in relation to foreign affairs, and no legislative power either, did they acquire either the one or the other when, in the course of political evolution, Canada as such attained independent international status? As of 1867 and later, Canadian subservience abroad involved under the Constitution federal or Dominion dominance at home. Would then independence abroad mean subservience at home, that is in the sense of loss of complete legislative power to implement domestically international obligations? International agreements involving matters that were in any event within Parliament's competence did not raise any issue. The only questions,

at least in a legal sense, were whether the central government could exercise the executive power of dealing internationally with matters which were domestically within exclusive provincial competence, and whether the central Parliament could legislate on those matters so far as necessary to carry out international obligations.

III

The British North America Act limits provincial legislative power territorially; a provincial Legislature must confine its valid enactments to operation within the boundaries of the Province. Prior to 1931 there were judicial pronouncements that the Parliament of Canada as well had no power to legislate extraterritorially but, whether or not these were correct, section 3 of the Statute of Westminster, 1931 was express in authorizing Parliament to enact extraterritorial legislation. There is no parallel provision with respect to the provincial Legislatures.

This does not mean, however, that the Province in its character as a juridical person (whether acting in a formal way as the Crown in right of the Province, or through the Lieutenant-Governor or through an authorized Minister) is unable to make agreements with persons or private agencies in another Province or in another country. (Whether or not such agreements involve implementing legislation commanding action or limiting action of the inhabitants of the Province may be put to one side for the moment). Nor does the want of provincial extraterritorial legislative power mean that independent (although

government-launched) agencies are unable to negotiate across provincial or international boundaries. They are in no different position from ordinary residents of the Province in this respect. In other words, private persons or non-governmental agencies may treat with governments, here or abroad, without thereby raising any immediate external affairs problem. It is unnecessary to become involved, for the purposes of this paper, into such allied questions as whether the private person or agency may, under the law of his or its country, engage in transactions abroad, or whether in case of any wrongdoing or injury in the course of an international transaction there may not be intergovernmental consequences or repercussions.

A totally different situation exists, however, where the Province as such, or the Crown in right of the Province, negotiates across provincial or international boundaries with another province or state or the government thereof, because here the question at once arises whether this is an assertion of power in relation to external affairs.

It is necessary to distinguish here dealings between provincial governments and dealings between a provincial government and a foreign state or a governmental unit thereof. Relations between provincial governments do not involve any issue of international law or international relations. Although there is nothing in the Canadian Constitution that expressly permits interprovincial agreements there is, equally, no prohibition and, indeed, nothing that suggests any prohibition.

By contrast, article 1, section 10, clause 3, of the Constitution of the United States is express that "no State shall, without the consent of Congress...enter into any agreement or compact with another State or with a foreign Power....". Without enlarging on the situation in the United States, it is enough to say that consent of Congress is not required in such minor matters as adjustment of boundaries, but on important matters such as flood control, allocation of water resources and control of crime (on which there are interstate compacts) such consent is admittedly necessary.

The reference to the position in the United States is important to point to a deficiency in the Canadian Constitution in its failure to prescribe any judicial forum for the determination of litigable issues between the Provinces. Provisions of this kind exist not only in the United States under article III, section 2 of its Constitution (reposing jurisdiction in the Supreme Court) but also in Australia under section 75(iv) of its Constitution (reposing jurisdiction in its High Court). In Canada, there is statutory provision in the Exchequer Court Act for that Court to hear disputes between Provinces with their consent. Presumably, in a contract action at least, one Province might sue another in the latter's Courts but legislation of the latter Province would have a telling effect on such suits. This enforcement problem as between Provinces is, however, peripheral to the main concern of this paper. On the substantive side, it is sufficient to say that the Provinces are quite free, independent of the federal execu-

tive or Parliament, to enter into agreements with each other and to implement those agreements, if necessary, within their respective boundaries, so far as the agreements deal with matters within provincial legislative jurisdiction or deal with property of the particular Provinces.

Where a Province seeks to deal with a foreign state or with a unit thereof (if the foreign state is a federation), a different situation exists. As a matter of internal constitutional law, there is the question whether the province may, so to speak, reach out to deal with a foreign government. The Canadian Constitution is silent on the matter, but it is an obvious inquiry whether the admitted prohibition against provincial extraterritorial legislative power means a correlative prohibition against provincial extraterritorial executive power. To refer again, comparatively, to the United States, article I, section 10, clause 1, of the Constitution says flatly that "no State shall enter into any treaty, alliance or confederation". This provision, taken in conjunction with the affirmative grant of treaty-making power in article II, section 2, clause 2, to the national government, and in conjunction with the already quoted article I, section 10, clause 3, respecting compacts with foreign states, and also in conjunction with the supremacy clause 2 of article VI ("treaties...shall be the supreme law of the land") makes the ascendancy and exclusive foreign relations authority of the national government of the United States clear.

The issue of provincial extraterritorial executive

power is compounded in difficulty by the situation which presently exists, under the governing judicial decisions, with respect to federal or Dominion executive and legislative power in respect of foreign affairs and international obligations. The matter must also be viewed from the standpoint of international law and the enforceability of obligations of an international character. In sorting out the problems that arise here it is well to begin by pointing out that for the purposes of international law there is no difference between a treaty, an international convention or international agreement. The formalities attending the assumption of an international obligation do not as such affect its international validity or enforceability. In my submission the situation is the same in Canadian constitutional law so far as concerns both internal executive power and internal legislative power; neither of these aspects of involvement in foreign affairs undergoes any change by reason of the fact that a treaty in its formal connotation is in contemplation, as opposed to a convention or any other type of intergovernmental agreement. I shall expand on this matter below.

IV

As part of Canada's British inheritance, the conduct of foreign affairs and the acceptance of international obligations have been regarded as matters for the executive (for the cabinet, to refer to the political authority). True enough, the cabinet is answerable to Parliament, but the latter has not generally imposed controls in advance to govern the manner and extent to which the cabinet may embroil the country in inter-

national affairs. Undoubtedly, it may do so if it chooses. Another aspect of the British inheritance (exhibiting in this respect a difference from the United States) is that Canadian law does not recognize the self-executing treaty, an international obligation which by its own force and terms becomes operative as domestic law. Thus, although the executive may bind the country internationally, the international commitment cannot as such become a rule of conduct for citizens without implementing legislation. (International involvements may have side effects on domestic transactions, but a review of these effects is not germane to the points under discussion).

It is, of course, possible to have intergovernmental arrangements which do not either envisage or require domestic implementation by legislation binding the citizen, because no change in the existing domestic law is involved. Thus, Canada and the United States might agree on the use or occupation by United States forces of military installations in Canada, or there might be an agreement on the exchange of scientific data. Such agreements can, as a rule, be carried out by executive or administrative direction alone. The blunt question that now arises is whether the federal executive is limited in any way by internal legal considerations in the range of matters on which it may engage in international negotiations. The question may be looked at in two ways: first, from the standpoint of an international obligation which requires no implementing legislation, and, second, from the standpoint of an international obligation that does. In this latter connection, it is

relevant to note that by international law, a state is under a duty to make or effect such legislative changes as are necessary to carry out its international obligations.

The answer to the question requires another look at the proposition stated at the beginning of this paper; namely, that the distribution of legislative power carries with it a correlative distribution of executive power. It is clear that first, in the colonial period, and later, in the period of Dominion status, and now, in the period of Commonwealth relations, official contact between the British Government and Canada or any part thereof has been and is through the federal government. It alone has presence or status for intra-Commonwealth dealings, as it alone had such status for dealings with Great Britain in earlier periods. This status was an attribute of external recognition, and not really dependent on anything expressed in the British North America Act. As such, it was not limited by the scheme of internal distribution of legislative power but reflected, in the sense in which it was concerned with "family foreign affairs", that there was only one channel of communication between Canada and the outside world and that was through the central government. Although not dependent on anything expressed in the Canadian Constitution, it had support in such provisions as those giving to the Governor General in Council the power to appoint the provincial Lieutenant-Governor (section 58), giving all residuary legislative power to the federal Parliament (section 91), and limiting independent provincial authority to action within the

Province (section 92).

The release by the British Government of legal and political control over Canadian affairs (formalized through Imperial Conferences in 1926 and 1930, and by the Statute of Westminster, 1931) invited external recognition of a wider kind and led to acceptance of the national government of Canada as the spokesman for Canada in international affairs and the only channel of communication between Canada or any part thereof and a foreign state. (Remaining legal fetters, such as the problem of constitutional amendment, do not detract from the validity of what is said in so far as it concerns the Dominion and the Provinces inter se.). Indeed, the general rule of international law is that only "states" may be subjects thereof, and a corollary of this has been that only one juridical personality can be recognized in a federal state. The exceptional departures from this rule in the cases of Byelorussia and the Ukraine, which became original members of the United Nations although being constituent republics of the Soviet Union, arose out of a constitutional change in 1944 by which each of the sixteen Union Republics was authorized to enter into direct relations with foreign states. The fact that only two republics became United Nations members was the result of a diplomatic compromise. Moreover, the two republics in question have limited their participation in international affairs to membership and activity in international organizations; they do not have ordinary diplomatic relations with foreign states. Although there is nothing in the Byelorussian and

Ukraine example that, in present circumstances, is any precedent for the Canadian Provinces, it is clear that the break-through to what has been called "marginal international personality" depended on both internal constitutional change and external recognition by acknowledged independent states.

It is a fact that there are no provisions in the Canadian Constitution (such as are found in the Constitutions of United States, Switzerland and the West German Republic) permitting the Provinces to make agreements with foreign states with the consent of the national government. I do not say that the national government may not, in any event, permit them to do so, but the want of power of this kind supports the conclusion that the national executive of Canada is in law free to make any kind of international commitment. Canada as such and it alone is responsible internationally if the commitment is not carried out. If it authorizes a Province to engage in international negotiations, as I believe it can, it will still be Canada as such that will be responsible internationally. A foreign state that purported to deal directly with a Province without going through the national external affairs department would be, in effect, recognizing it as having international personality; certainly, the foreign state could not claim to hold Canada accountable if there was a default in the concluded agreement. Conversely, if a Province were to seek to deal directly with a foreign state, the latter's proper answer would be to refer to the Canadian national authority to ascertain if it agreed and if it would stand behind any agreement

that was reached.

If the federal executive is free to act, and act exclusively, in any or all matters, as the Canadian organ of treaty-making or of the making of less formal international agreements, is the federal Parliament equally able to act as fully in implementing domestically the results of its international negotiations? It was empowered to do so under section 132 of the Constitution when the British Government was the organ for the conduct of Canadian foreign relations, but with the federal executive of Canada now acting as such organ, and section 132 no longer applicable, the governing rule is presently that laid down by the Labour Conventions case in 1937. The principle of that case is (to use the words of the Privy Council which decided it as Canada's highest Court at the time) that "for the purposes of.....the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained." The bifurcation of Canada's implementing power, according to whether the matters covered by a treaty or convention or other agreement are otherwise within federal or provincial legislative power, was seen by the Privy Council as necessary to protect provincial constitutional autonomy, and particularly (the judgement suggests) the exclusive competence of Quebec. In this light it stated that "there is no existing constitutional

ground for stretching the competence of the Dominion Parliament, so that it becomes enlarged to keep peace with the enlarged functions of the Dominion executive.....the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution that gave it birth....."

What the Privy Council's judgement means is that once section 132 is left behind, neither the federal residuary authority nor the principle of the exhaustiveness of legislative power is adequate (alone or in combination) to spell out an unlimited pwer to implement international obligations. Indeed, in the Labour Conventions case, what were involved were conventions rather than treaties, and it is clear that regardless of the form of the international obligation, or indeed lack of form (it might arise by an exchange of notes), the power of implementation is governed by the ordinary rules of distribution of legislative power between Canada and the Provinces. Earlier case law had likewise recognized that no distinction should be drawn, so far as implementation was concerned, according to the form of the international obligation; an intergovernmental convention (it was said in the Radio case) came to the same thing as a "treaty" for purposes of section 132, and the Labour Conventions case shows that they involved the same considerations outside of section 132. Power to implement international promises was not a constitutional value that could be assigned exclusively to the federal Parliament merely because the federal executive was now managing foreign affairs.

In this respect, the situation is different in the United States (where, however, the Constitution is much clearer), and different too in Australia whose Constitution confers power on the Commonwealth Parliament over "external affairs". In both of these federations, by decisions of their highest Courts, full implementing power resides in the central legislature, whether or not the matter of the international obligation is one otherwise within the exclusive competence of the states. Notwithstanding this omnicompetent legal power, both the United States and Australia have been restrained by the centrifugal forces which are present in all federations from pushing their constitutional authority too far. They have also from time to time insisted on inclusion of so-called "federal state" clauses in international agreements to which they are parties, clauses whose purpose generally speaking is to entitle the federation to discharge its international obligation by remitting the agreement for implementation to its constituent states where it deals with matters ordinarily within state competence. It is clear, of course, that Canada, but not the United States or Australia, has ground to put a "legal" face on a request for a federal state clause or on a refusal to participate in multilateral negotiations that envisage agreement on matters that otherwise fall within provincial power.

This is not the place to argue for or against the legal limitation presently operable on Parliament in respect of international agreements. It is supported by so close a

student of federalism as Professor K. C. Wheare, but opposed by retired Justice Rand who asserted that he "cannot agree that it is possible to eliminate treaty character from legislation accomplishing its terms", and that "the totality of treaty-making action.....(is) a discrete and entire subject matter" whose only place of reception is in the residual power of the Dominion. Eighteen years after the Labour Conventions case, Lord Wright who sat on the case as a member of the Privy Council (which at that time gave only a single and ostensibly unanimous opinion) expressed his dissent from the principle there laid down, and in 1956, a year later, the late Chief Justice Kerwin said in the course of his judgement in Francis v. The Queen that "it may be necessary.....to consider in the future the judgement of the Judicial Committee in the Labour Conventions case". No clear opportunity has since arisen for any such reconsideration.

V

In the present state of Canadian constitutional law and applicable international law, a Province can engage in dealings with a foreign government only through the authority of the national government, and it would in that respect be really a delegate of the national government. The latter is entitled to determine how and by whom it will be represented abroad. For example, in the Columbia River negotiations with the United States, the Canadian Government took the exceptional step of including a representative of the Government of British

Columbia in the Canadian delegation. It is thus possible for it to give authority to a completely provincially-chosen delegation. But the international responsibility would be that of Canada not that of the Province.

It is my opinion that if a Province presently purported on its own initiative to make an enforceable agreement with a foreign state on a matter otherwise within provincial competence, it would either have no international validity, or, if the foreign state chose to recognize it, would amount to a declaration of independence on the one hand, and, on the other, to a denial of the exclusive juridical competence of Canada as such in the field of foreign affairs. It would then be for Canada to assert that competence against both the Province and the foreign state. Nor could the Province, in my opinion, give such an agreement domestic validity by implementing legislation because (as a matter of internal constitutional law) such legislation would be vulnerable as being action taken under a non-existing power to enter into international commitments. It cannot be the case that because the plenary federal executive power in foreign affairs is not complemented by a plenary implementing power, the result is that the Provinces are able to implement when they have no antecedent executive power to act independently in foreign affairs.

The presence abroad of provincial agents-general, in the main in Great Britain, does not undermine this assertion. They are not accredited to any foreign government although they do receive what may be called diplomatic courtesies.

Essentially, they are governmental representatives promoting the commercial interests of their respective Provinces. Any strictly diplomatic issue, involving intergovernmental dealings, is normally referred to the High Commissioner's office. If the office of agent-general were to develop as a diplomatic one involving accreditation to another government, this would necessitate a re-writing of both Canadian constitutional law and international law if the Canadian federation was to survive in any way closely resembling its present position.

Again, the assertion in question is not belied by the instances in which Provinces have engaged in discussions and entered into various arrangements, reciprocal or otherwise, with foreign governments or units or agencies thereof. The Supreme Court of Canada in Attorney-General for Ontario v. Scott, decided in 1955, has recognized a distinction between treaties or international agreements and arrangements which do not involve obligation but which envisage reciprocal or concurrent legislative action. One instance is an arrangement between Ontario and Great Britain (as well as with other Provinces of Canada) for co-operative enforcement by each within its jurisdiction of maintenance orders issued by the other against deserting husbands. The line is thin between such arrangements and international agreements but the Supreme Court left no doubt that the Provinces were competent as to the former but not as to the latter. Even such permissible arrangements require, however, that the federal external affairs department be used as the channel of communication.

Other dealings have taken place between Provinces and border states of the United States, the latter being authorized by the Congress under the "compact" clause 3 of article I, section 10, of the Constitution. The extent and range of such arrangements (limited, of course, to matters within provincial legislative jurisdiction) may well form the subject of a companion study, and it is enough to say here that, in present circumstances, there can be no international agreement without the participation of and assumption by Canada of international responsibility.

There are legal as well as formal differences in the role that the Provinces may play in the kind of arrangements sanctioned by the Scott case and in the implementation (under the rule of the Labour Conventions case) of international agreements made by Canada. The international agreement not only provides a basis for domestic action but, subject to a "federal state" clause in the agreement or other alleviation, such action is commanded by international law. If provincial implementing legislation is enacted, any repeal or change could involve Canada in a breach of international obligation. No such consequence would, of course, flow from like action taken in respect of the kind of reciprocal or concurrent (and non-obligatory) arrangements dealt with in the Scott case. The situation forces speculation whether the difference in the two kinds of dealings is not merely a rationalization of the willingness of the foreign state to forego the legal sanction that ordinarily accompanies an agreement; or, to put the matter

in other terms, whether this is not a case of trying to find a means of effective co-operation with a unit of a federal state in a matter of local concern to it without disturbing the formal rules of international law. If so, it must be evident that not only the foreign state but Canada as well is willing to make the compromise.

The Constitutional Competence Within Federal Systems As To International Agreements

By Professor Edward McWhinney

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The Constitutional Competence Within Federal Systems As To International Agreements

The controversy over the constitutional powers of the Provinces, within the Canadian federal system, as to international agreements has so far been conducted on a rather abstract, doctrinaire basis. It does not seem, up to date, to have involved practical consequences for Canada at the international law level. What scientific legal discussions we have so far has been concentrated on the rather limited issue -- going to purely internal, municipal law questions -- of the constitutional competence respectively of the Dominion and of the Provinces to implement treaties, on the assumption that such treaties have been validly entered into by the Dominion in the first place. This is the nub of the extended debate in Canada over the Labour Conventions decision of the Privy Council of 1937. Passing over, as irrelevant for present purposes, the arid conceptualism of the reasoning by which that decision of the Privy Council was arrived at, it is impossible today not to be a little amused by the uncontrolled extravagance of some of the criticism with which the Labour Conventions decision was first greeted in Canada. For the Labour Conventions case held, in effect, that where, in the absence of a treaty, a particular head of subject matter would come within Provincial legislative powers, the Dominion could not, simply by making a treaty, ipso facto, acquire legislative power over that matter: the Dominion, in such case, to secure constitutional implementation of the treaty within Canada, would have to obtain

any necessary Provincial cooperation by way of Provincial legislation. The Labour Conventions decision thus represents one polar extreme of federal constitutional doctrine, in contrast most markedly to Mr. Justice Holmes' sweeping, nationally-oriented, treaty-implementation power, adumbrated in his "migratory birds" case opinion, for the United States Supreme Court, in 1920. Whatever else it may have done, however, the Labour Conventions decision of the Privy Council has not, per se, constituted a "disaster" for Canadian federalism, or "made the conduct of a rational Canadian foreign policy impossible", as was suggested by certain Canadian commentators in the late 1930's and thereafter. Indeed, looking back, it can be said that no single example has ever been cited, in the years since the Labour Conventions decision was first handed down, where its rationale has presented any practical difficulties, or even mild inconvenience, in the conduct of Canada's foreign relations by the Dominion government. On the practical, empirical level, it has proved perfectly possible for Canadians to live with the Labour Conventions decision; and so the purely abstract, a priori, conclusions of constitutional doom and gloom of the late 1930's have been amply dispelled by the record of events since that time.

For the record, let me note here that the Federal Constitutional Court of West Germany, in 1957, was seized with an identical problem to the Labour Conventions fact-situation, in the famous Reichskonkordat case.[1] Now the German judges deciding the Reichskonkordat case in 1957, and for that matter also counsel arguing the case before them, were acquainted with

the United States "migratory birds" decision and the Canadian Labour Conventions decision, and they were thus aware of the twin extremes of doctrinal position as to federal constitutionalism represented by these two cases. Nevertheless, for its own decision, the German court consciously preferred the Labour Conventions rationale. For the German court reasoned that, on a balance of the possible inconveniences presented by any such ruling to the practical conduct of German foreign policy, and of the countervailing political advantages of any such ruling in terms of encouraging and strengthening Lander (Provincial) authority in a pluralistic federal system, the Provincially-oriented rationale of the Labour Conventions decision was the correct constitutional resolution of the problem for West Germany. And so it has been, in West Germany, that the Reichskonkordat decision of 1957 which again, like the Labour Conventions decision, was alleged, after it had been handed down, to be quite incompatible with maintenance of a strong and effective German foreign policy, has proved to be quite capable of being lived with, thereby confounding the more dismal prognostications of its original critics.

There was a time, and particularly in the mid-1950's, after Lord Wright's revelation of his own originally dissenting voice in the actual Privy Council voting line-up in 1937 in the Labour Conventions case, and after some related disclosures of the casually sloppy methods whereby the final Privy Council majority was arrived at -- when the Labour Conventions decision looked as if it would be overthrown by the Canadian Supreme Court.

I assume that more recent political developments in Canada, and the renewed strongly centrifugal trends in favour of the Provinces, render any such development politically virtually impossible under present conditions. This being so, the emphasis today has moved away from treaty-implementation (the constitutional implementation, in internal, municipal law terms, of a validly concluded international agreement), to treaty-making (the question of the constitutional power, within the Canadian federal system, validly to conclude an international agreement). For two possibilities exist as to treaty-making in a federal system. Either the federal, (in Canada's case, Dominion), government has the sole power to conclude treaties whatever the respective powers of the federal government and of the member-states or Provinces as to legislative implementation of those treaties; or else the competence to conclude treaties must be divided between the federal government and the member-states, according as, (and corresponding to treaty-implementation power after the Labour Conventions decision), the subject matter of the treaty, in the absence of the treaty, would be divided between federal government and member-states or Provinces. Unlike the issue of treaty-implementation which raises purely internal, municipal law questions, which are no direct legal concern of other countries (except, as a practical matter, in terms of their hunches as to the political chances of such treaties being acted upon), the issue of treaty-making as such necessarily involves international law questions of concern to other countries which might wish to conclude treaties with Canada. A sustained argument, in regard to this

question of treaty-making, has been advanced in behalf of the Province of Quebec; and it is supported by a number of comparative law references -- variously to West Germany, Switzerland, the Soviet Union, and some of the "new" federal systems of Asia and Africa. I am rather less impressed by these comparative law citations, which too often rest on the "law-in-books" of abstract constitutional texts, without regard to the "law-in-action". In the case of West Germany, for example, the most recent (1965) instance of an attempt at independent treaty-making power on the part of the Land (Province) -- the Niedersachsen-Vatican Konkordat, as a matter of "law-in-action" finally accorded completely with classical federal constitutional law notions. For although the government of the Land of Niedersachsen was of the opinion that it had plenary constitutional powers to conclude a treaty (Konkordat) with the Vatican, and in fact deliberately limited itself to a courtesy "for your information only", notification to the West German federal government of the fact of the Konkordat, the Vatican itself submitted the text of the Konkordat to the West German foreign ministry for approval and endorsement; and the West German federal government, against the constitutional views of the Land of Niedersachsen, in fact exercised what it clearly considered to be its constitutional right to endorse the Land agreement with the Vatican.

A number of other examples cited in behalf of the Province of Quebec are less examples of treaties, as such, than of species of international or trans-national agreements

other than treaties.

I take it that a treaty is merely one species of international agreement whose legal significance is that it brings into play particular international law consequences not necessarily applicable to the other species of international agreements. Thus a treaty would give a right, in the event of any default to its terms, to any co-signatory thereby prejudiced to take appropriate measures -- for example, at the diplomatic level, in the United Nations, in the World Court if applicable, -- to ensure proper compliance. Again, a treaty, by definition, is concluded between nation-states as such; where other forms of international agreements might be concluded, for example, between a nation-state on the one hand and a private corporation or company in another nation-state; or between two government corporations in different nation-states; or between two private corporations in different nation-states. Examples of such international or trans-national agreements, being less than treaties, -- perhaps international "non-treaties", if I may borrow a term from the Theatre of the Absurd -- would be the recent agreement between Renault (a property of the French government), and the Societe Generale de Financement (a provincially-owned investment corporation of the Province of Quebec) granting the latter a licence to manufacture Renault cars in Canada; or agreements between governmental forest fire-fighting agencies of a Canadian Province and of an American state on common fire control and prevention measures; or similar agreements

as to joint road-building projects, as between a Canadian Province and an American state; or even agreements between a Canadian province and individual American states as to the best commercial utilisation of a river flowing (so far as Canada is concerned) wholly within the one Canadian province. I cannot really see what legal concern such agreements can be of the Dominion government; and I incline to the same opinion in regard to Provincial agreements with foreign companies granting them powers of exploration and development of so-called "off-shore" oil rights, at least where such agreements do not impinge on federal defence and navigation interests. Of course, as international "non-treaties", such international agreements as these afford rather less protection, at law, than does the category of "treaties" as such: I take it that, apart from the limited parens patriae-type protections that any one nation-state might invoke in behalf of its own citizens (including private corporations), the effective recourse would be no more than the ordinary legal remedies through the ordinary courts. And even these, presumably, would be qualified by the rule, which I have no doubt that Canadian courts would borrow from American constitutional precedents, that member-states (Provinces) of our federal system cannot, as such, be directly sued by foreign states in our courts.

In the end, therefore, foreign states or instrumentalities seeking to do business with Canadian Provinces by other than the more direct, treaty, route, must do so at their own risk and with a certain awareness that they will be receiving somewhat less

than the full range of legal protections and safeguards that they would obtain by seeking to make a treaty with Canada as such. If, however, they wish to proceed in that way and deal directly with the Provinces or provincial authorities in matters otherwise within Provincial competence, that is their own business and that of the Provinces concerned, and certainly not any business of the Dominion.

By the same token, I cannot see why the Dominion should be upset if Quebec or any other Province should wish to make cultural or cultural exchange agreements directly with other countries, as Quebec has in fact done with France. The essence of such agreements is that they rest on goodwill, and mutual, reciprocal benefit, for their effectiveness: one does not go to law over them. I take it that France and Quebec concluded their recent (1965) agreement because of their common interest in a cultural matter in regard to which the Dominion seemed to have been either aloof and disdainful, or else deplorably slow to act. By the same token, however, in the absence of a cultural exchange agreement between Canada and the Soviet Union (paralleling the successful Soviet-United States cultural exchange agreement which has existed now for a number of years), it is possible that the Province of Ontario or other provinces whose universities and advanced institutes have special scientific and cultural interests in this particular area, might wish themselves to take the initiative and to fill the gap brought about by Ottawa's inaction. (Ontario, by the same token, might logically

wish to conclude its own cultural exchange agreement with France, in view of Ottawa's patent inaction in this area also).

Ottawa officials, of course, blame their own lack of initiative in the area of Canadian-Soviet cultural relations on intransigent political pressure from Quebec; and no doubt Ottawa blames English-speaking Canada for the Dominion's like failure to conclude a cultural exchange agreement with France. In either case, Provincial action in behalf of Provincial needs seems both rational and justified, and in any case to raise no particular problems of international or constitutional law affecting the Dominion. For it would be absurd if the Bicultural premise or grundnorm of Canadian federalism were to stultify any form of action, whether Dominion or Provincial, in areas of obvious interest and concern for us all.

And so, on a practical level, a lot of the apparent problems raised by Quebec's tentative ventures into trans-national governmental and commercial operations are seen not really to exist at all. Further, other provinces would seem to have similar interests to Quebec in developing such operations outside their own frontiers; and in any case to have done so, in the past, on numerous occasions, without as yet raising any particular international or constitutional law problems. Here, once again, as in many other areas of the current Canadian constitutional "great debate", once one ceases to worry about the old-fashioned, abstract and theoretical questions of where sovereignty lies and whether it is divisible in any sense, and once one concentrates

on actual problem-solving, there may be seen to be a good deal more common interest, and a good deal more flexibility and room for give-and-take accommodation, than one had heretofore suspected on a basis of purely a priori constitutional positions.

ADDENDUM

On November 17th, 1965, Canadian External Affairs Minister Paul Martin announced that Canada and France had "signed a general agreement designed to promote cultural, scientific, technical and artistic exchanges". (Globe and Mail, Toronto, November 18th, 1965). The agreement is recorded in an exchange of letters between Mr. Martin and French Ambassador to Canada, Francois Leduc, in which Mr. Martin notes that provincial governments will be free to make their own cultural agreements within the framework of the Canadian-French agreement: "The authority for the provinces to enter into such ententes will stem from the fact that they have indicated that they are proceeding under the cultural agreement and the exchange of letters of today's date, or from the assent given them by the federal Government". Mr. Martin's letter, it is also stated, "places on the French Government the responsibility to inform the Canadian Government of such agreements with the provinces". (ibid.)

On November 24th, 1965, the Government of Quebec announced that it had signed a new agreement "designed to bring the French spoken in Canada closer to international French and

to quicken the rate of artistic and scientific exchanges being promoted by the two governments". (Globe and Mail, Toronto, November 25th, 1965). The agreement was signed in the Legislative Council chamber of Quebec, by French Ambassador to Canada, Francois Leduc, and Quebec Minister of Cultural Affairs, Pierre Laporte, in the presence of consular officials of the United States and the United Kingdom. Ambassador Leduc was stated to have exchanged letters in Ottawa with Canadian External Affairs Martin, before signing the document in Quebec City that same day. Quebec Minister Laporte announced that, in the preparation of the agreement, -- "close contact was maintained between the Quebec Minister of Federal-Provincial Affairs and Mr. Martin of Canada. We wanted to be sure, during the preparation stages, that our agreement would receive the assent of the Government of Canada with regard to its foreign policy". (ibid.)

Now while the "grand design" of the Department of External Affairs in Ottawa, in this matter of the Quebec cultural accord with France, seems clear, it is not so certain just what legal position the Government of Quebec has finally chosen. I take it that External Affairs in Ottawa view the full international law power to conclude cultural agreements abroad as being vested in the Dominion alone; and they would also view the Dominion as having, with the particular Canada-France agreement made on November 17th, 1965, established a model for conduct for the future, of an overall, Dominion-established, "umbrella" agreement, within whose framework and terms (but only within whose framework

and terms) the Province might be free to act as, in effect, delegate or agent of the Dominion. Quebec Minister Laporte's statements on the occasion of the signing of the Quebec-France cultural accord of November 24th, 1965, do not go quite so far as that. There are some elements, in Mr. Laporte's announced position, of the Land of Niedersachen's "courtesy", "for your information, only", notification to the West German Federal government in the Niedersachsen-Vatican Konkordat affair (discussed above).

On the facts of the Quebec-France cultural accord, as so far revealed, no international law consequences seem to be involved in its concrete implementation; and so it would appear to come within the ambit of the general rule suggested above, that the Provinces, in respect to subjects within their specific constitutional powers as defined in the B.N.A. Act, are fully competent to conclude, in their own authority, trans-national agreements not having international law consequences. The elaborate verbal juggling and polite by-play as between Quebec and Ottawa, on the occasion of this particular Provincial trans-national accord, would reduce to an example of ordinary good manners and common-sense as between parties to a federal state, not really going to matters of constitutional competence. Of course, exercise by a member-state or Province of a federal system of its own constitutional powers in such a way as deliberately to embarrass or frustrate the federal government in the conduct or exercise of its own federal powers may, if

sufficiently flagrant, constitute a breach of federal comity and so fall. The conceded initial constitutional power, in such a case would fail because of the unconstitutional manner or mode of its actual user. But that is another story which merits examination in its own right under the well known constitutional rubric of federal comity or federal fidelity (Bundestreue). See, in this regard, the discussion in the author's Constitutionalism in Germany and the Federal Constitutional Court (1962), p. 51 et seq.; and Comparative Federalism, States' Rights and National Power (2nd ed., 1965), p. 78 et seq.

Footnote

1. The Reichskonkordat case is analysed in detail in my Constitutionalism in Germany and the Federal Constitutional Court (1962), p. 46 et seq., and in my Comparative Federalism (2nd ed., 1965), p. 36 et seq.

Treaty-Making Power in Canada

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Treaty vs. Agreement

In the past year strong assertions have emanated from the Province of Quebec to the effect that each of the provinces has the power according to the Constitution of Canada to sign international agreements dealing with matters under provincial jurisdiction.

As a first step in analysing this proposition the writer proposes to eliminate what is, in his opinion, a semantic quibble, the difference between treaty and international agreement. Quebec's former Minister of Education, Paul Gerin-Lajoie, in advocating the existence of the above-noted power, seeks to distinguish international agreements from treaties as follows:

> "The word treaty is usually reserved to designate the more solemn, almost majestic agreements which are liable to have a direct effect on the political relationship between two states, whereas an agreement is restricted to a more modest purpose without specific bearing on political relations."(1)

It is submitted that the following quotations do much to refute the suggestion of a difference in terminology having any significance in International Law.

Professor D.P. O'Connell states:(2)

> "A treaty is an agreement between States, governed by International Law as distinct from Municipal Law, the form and manner of

> which is immaterial to the legal consequences of the Act ... The name given to the instrument is immaterial provided the parties have contractual capacity in international law, and provided their agreement is intended to create rights and obligations, or to establish relationships governed by International Law."

The Harvard Research, in the introductory comment to its Draft Convention on the Law of Treaties,(3) has the following to say:

> "Some international instruments are called 'treaties' eo nomine, but a whole repertory exists from which names for instruments may be chosen. 'Convention', 'protocol', 'agreement', 'arrangement', 'declaration', 'act', 'covenant', 'statute' - all of these terms have been employed with reference to international instruments concluded in recent times, and the choice of one rather than another is in most cases, if not in all, without any significance in International Law."

Accordingly, Article 4 of the Draft Convention reads:

> "The international juridical effect of a treaty is not dependent upon the name given to the instrument."

In the Draft Code on the Law of Treaties of the

International Law Commission[4] Article 2 reads as follows:

> "Agreements, as defined in Article 1, constitute treaties regardless of their form and designation."

Sir Hersch Lauterpacht, Special Rapporteur, in his comment[5] on Article 2 states:

> "The principle laid down in this article is generally recognized. While the terms 'treaty', 'convention', 'agreement' and 'exchange of notes' are the most common ... a great variety of other terms are occasionally also used ... The terms used are of no legal consequence, so long as the instrument in question can properly be interpreted as creating legal rights and obligations ... in most cases there is no apparent reason for the variation in the terms used."

Professor Hudson, in his work on the P.C.I.J. is quoted by Lauterpacht[6] as saying:

> "... the names chosen for an instrument, frequently due to political or casual considerations, is seldom of juridical significance."

Sir Gerald G. Fitzmaurice says:[7]

> "The designation is irrelevant."

The writer apologizes for the copious quotations but, considering the acknowledged credentials of the proponent of the distinction it was believed necessary to use, in reply, the words of equally accredited writers. What is attempted by the

above is to illustrate that the adage "A rose by any other name..." is quite applicable to the supposed distinction. The term treaty is a generic term with the species of the genus ranging in their titles from Charter to Treaty to Agreement to Arrangement. One of the species, the Treaty, for many conjures up the most formal conclusion of an arrangement between Heads of States; formal exchange and inspection of instruments signifying the grant of full powers, Royal Seals attesting signatures and so on. The manner and form of concluding arrangements, however, has often little to do with the importance of the relationships, political or economic, thereby created. It is interesting to note, for example, that an inter-governmental agreement was the instrument by which Canada signified her assent to the terms of peace following the Second World War. While the title may reflect its political origin, e.g. whether it was made in the name of the head of state or in the name of a minister of a government department, it has no legal significance in International Law, nor, it is submitted, in Constitutional Law.

Having disposed of the semantic quibble, to the writer's satisfaction at least, it becomes necessary to answer the question whether a province, as a constituent member of a federation, can enter into an international agreement intended to create legal rights and obligations, or to establish relationships, governed by International Law.

It is proposed to answer the question by looking first

at what the writers on International Law have said, then to examine the evolution of treaty-making power in Canada as seen in the custom and practice of the past century (at times formulated at Colonial and Imperial Conferences) and finally by a review of judicial pronouncements on the subject.

International Law Opinion

A federal state may divide its treaty-making power between its central and regional governments or it may vest the whole of it, with or without limitations, in its central government alone. As Lord McNair puts it:(8)

> "Normally, it is the Federal Government that exercises the totality of international capacity to conclude treaties and it is the exception to find any of the Member States being permitted to participate in this function. From this point of view the United States of America, the Dominion of Canada, and the Commonwealth of Australia may be regarded as belonging to the pure type, in which the whole treaty-making capacity is vested in the Federal Government; the member states or Provinces possess no such capacity, although their co-operation may be required for the purpose of implementing a treaty..."

Where the constitution of the federal state says nothing concerning the distribution of treaty-making power there is a

presumption in International Law that the regional governments have no such power, i.e. the central government is to be deemed to have full and exclusive treaty-making power.

The Report of the International Law Commission on the Law of Treaties in 1953, H. Lauterpacht, Special Rapporteur,(9) is, according to the preface, "intended primarily as a formulation of existing law." In discussing the capacity of parties to enter into treaties, Lauterpacht points out, with illustrations, that the constitutions of some Federal States (e.g. Switzerland) authorize members of the federation to enter into agreements with one another and, to a much more limited degree, with foreign States. He notes that International Law authorizes States to determine the treaty-making capacity of their political subdivisions and submits that the conferment, by constitutional law, of the treaty-making capacity upon the member States, amount to a delegation of that power on the part of the Federal State. He comments:(10)

> "On the other hand, in the absence of such authority conferred by the federal law, member states of a Federation cannot be regarded as endowed with the power to conclude treaties. For according to International Law, it is the Federation which, in the absence of provisions of constitutional law to the contrary, is the subject of International Law and international intercourse.

> It follows that a treaty concluded by a member state in disregard of the constitution of the Federation must also be considered as having been concluded in disregard of the limitations imposed by International Law upon its treaty-making power. As such it is not a treaty in the contemplation of International Law. As a treaty, it is void."

In Canada, of course, there is nothing in constitutional law conferring treaty-making authority on the provinces. There is nothing of the sort in the B.N.A. Act with its amendments, none of the royal prerogative in treaty-making delegated to the provinces; in the void the presumption operates.

It is interesting to note that in the Report of the International Law Commission on the Law of Treaties in 1956,(11) G.G. Fitzmaurice, Special Rapporteur, would go even further than Lauterpacht. While admitting that in certain cases component parts of a Federal State have, or appear to have, concluded treaties with foreign nations, Fitzmaurice maintains that in law:

> "These are really cases where the component part has simply acted as agent to bind the Federation as a whole, in respect of a particular part of its territory, since a component part of a State cannot itself be a State (internationally) or have - except as agent - treaty-making capacity ... (such) treaty will bind the Federation, and

> will bind the constituent State not as such, but only as an (internationally) indistinguishable part of the Federation."(12)

It should be noted that Fitzmaurice, when speaking of 'treaty' includes in such term an international agreement cast in a form different from that of a treaty, e.g. an exchange of notes, letters or memoranda.(13)

The basis for the presumption noted above is that it is a basic principle of every federation that a unified foreign policy in relation to other nations be provided and that international agreements entered into by the component units, inconsistent with the national interest and policy, be prevented. Without such unified foreign policy, the federation becomes an association of states, a confederation. In this respect, Hall notes:(14)

> "... the distinguishing marks of a Federal State upon its international side consist in the existence of a central government to which the conduct of all external relations is confided and in the absence of any right on the part of the States forming the corporate whole to separate themselves from it."

And to similar effect, J.L. Brierly notes:(15)

> "But it is usual today to distinguish a federal state, that is to say, a union of states in which the control of the external relations of all the

> member states has been permanently surrendered to a central government so that the only state which exists for international purposes is the state formed by the union, from a confederation of states, in which, though a central government exists and exercises certain powers, it does not control all the external relations of the member states, and therefore for international purposes there exists not one but a number of states."

From the above it is clear that if Quebec, or any other Province, was permitted by constitutional law to conduct its own international relations and sign its own international agreements, independently of any control by the federal government, it would, of necessity, cease to be a part of the federation of Canada and it would become a separate state as it would then possess the essentials of statehood. Such effect is clear from the words of Brierly.(16)

> "A new state comes into existence when a community acquires, with a reasonable probability of permanence, the essential characteristics of a state, namely an organized government, a defined territory, and such degree of independence of control by any other state as to be capable of conducting its own international relations."

It is the object of this section of the paper to attempt to locate the power to bind Canada and its component parts inter-

nationally. When speaking of authority to act in external affairs one must distinguish between the executive act of entering into a treaty and the legislative act of implementing the treaty. For the purpose of treaty performance the British dualistic view is followed by Canada which dictates that, as opposed to the monistic view of the United States (Article 6 sec. 2 of the U.S. Constitution), a validly concluded treaty does not automatically become the law of the land.(17) Before it can be effective in the courts it must be embodied in a statute; without such statute private rights cannot be affected nor the existing law changed. Lord Atkin in the Privy Council in the Labour Conventions Case observed:(18)

> "It will be essential to keep in mind the distinction between the formation and the performance of obligations constituted by a treaty, using the word as comprising any agreement between two or more sovereign states. Within the British Empire, there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action ... but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone."

Constitutional Law

It is a universally accepted principle of International Law that what authority or authorities shall exercise the treaty-making power of a sovereign State, what procedure is to be followed by its Governments for making treaties binding it in International Law, and whether its political sub-divisions should have any part in their conclusion, are matters entirely for the Constitution of that State to determine.(19)

To locate this executive power of making a treaty binding on Canada and its parts we must look therefore to the Canadian Constitution. The Constitution, of course, is based only in part on the B.N.A. Act with its amendments and the rest must be found in the statements and writings of secretaries of state for the colonies, in the minutes and resolutions of the Imperial Conferences, in the customs and actual dealing with situations that have grown up and been employed by the statemen of the Empire, and in the judicial determinations.

The B.N.A. Act yields nothing concerning treaty-making, and the effect of treaties when concluded, save sec. 132 which reads as follows:

> "The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries."

By sec. 132 then the Dominion Parliament was vested with the authority to implement a treaty entered into by the British Empire with foreign countries whether such treaty incurred obligations for Canada or any province thereof. Such a treaty was made by the "imperial executive responsible to and controlled by the imperial parliament."(20)

An example of the use of this power is seen in the Dominion legislation enacted to implement the Convention relating to the Regulation of Aerial Navigation. The Convention, signed at Paris in 1919, was a treaty between the Empire and foreign countries, His Majesty being represented by the Prime Minister of the United Kingdom as general plenipotentiary and also by separate plenipotentiaries for each of the Dominions, the latter signing for their respective Dominions as parts of the Empire. The convention was ratified by the King on behalf of the Empire. The Dominion legislation was upheld as a valid exercise of the power given it by sec. 132.(21)

The International Radiotelegraph Convention, 1927, was not a treaty between the British Empire and foreign countries. It was not concluded in Heads-of States form but rather was an inter-governmental agreement. Canadian representatives were appointed and authorized to sign on behalf of Canada by Orders in Council, and ratification on behalf of Canada was effected by an instrument signed by the Secretary of State for External Affairs without any intervention of the Crown. The Privy Council upheld the Dominion legislation enacted to implement the Conven-

tion but could not find the power in sec. 132; rather they located it in the "peace, order and good government" clause.[22]

The Privy Council found it "impossible to strain the section" (sec. 132) to cover the Dominion legislation enacted to implement the conventions adopted by general conferences of the International Labour Organization. These conventions had been approved by resolutions of the Senate and the House of Commons and the instruments of ratification were executed by the Secretary of State for External Affairs. The Privy Council noted:[23]

> "The obligations are not obligations of Canada as a part of the British Empire, but of Canada, by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries."

With the mentioned emergence of Canada as an international person and the corresponding end of treaties concluded by the King applicable automatically to all parts of his realm, sec. 132 became obsolete. At the time of Confederation it was not contemplated that the Dominion would ever make treaties with foreign countries independently of the imperial parliament. As Viscount Dunedin in the Radio Case[24] observed:

> "This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867."

and again Lord Atkin in the Labour Conventions Case:[25]

"... it was not contemplated in 1867 that the Dominion would possess treaty-making powers."

It is therefore understandable that no provision is made in the B.N.A. Act vesting treaty-making power in either the Dominion Executive or the Provincial Executive. Since, however, treaties binding on Canada or any of its provinces are no longer made by the Imperial Government it becomes necessary to look to the other sources noted above if we are to locate and fix the necessary executive authority to-day. The length of the following historical account was found necessary as the writer was driven back in time to find a suitable beginning to explain logically the coming across the seas of this executive authority.

The writer means to show that, while before Confederation the individual colonies were seeking power to negotiate their own treaties, after Confederation this power was sought not by the individual provinces but the Federal authorities. The story of the successful search bears repeating as it illustrates that the Dominion Parliament was always considered the channel of communication by the British Parliament with respect to Commonwealth affairs and, on Canada's accession to international status, by other countries with respect to foreign affairs affecting Canada and its provinces. The story does show the devolution of treaty-making power to the Dominion executive; in the story the devolution of treaty-making to Provincial executives is conspicuous by its absence.

Growth of Power in Canada

It was obviously the intention of Lord Durham, in his famous Report of 1840, that a division be made between colonial or internal matters and Imperial matters, regulation of foreign relations and trade, and that only the former be given to the control of the colonial legislature. The following demonstrates that the division could not be maintained.

During the years 1846-1849 the Empire was placed on a free trade basis. In 1846 Acts of the Imperial Parliament repealed the Corn Laws,[26] ended British preferences for goods from the colonies,[27] generally abandoned protectionist duties and empowered the B.N.A. provinces to repeal duties previously enacted by the Imperial Parliament which had protected British manufactures in these provinces from American and other foreign competition.[28] In 1849 the navigation code, which had restricted other nations from entry into the carrying trade of the Empire, was repealed.[29]

The end of the old commercial system with the placing of the Empire on a free trade basis arrived not because of agitation by the colonies, though indeed such did exist, but rather because of agitation at home especially by manufacturers to whom the export trade was all important. During the first fifty years of the 19th century, England led the world as a manufacturing and exporting nation and manufacturers realized that no tariff protection was necessary to secure the home market. They were also convinced that they could hold the markets of the

colonies even in the face of high duties. These manufacturers of course needed raw materials and sought their free entry into England.

Explaining the legislation of 1846 and 1849, Lord John Russell, then Prime Minister of the United Kingdom, stated the following:

> "We have plainly declared that, on the one hand, if we require productions similar to those which our colonies produce, we shall be ready to take them from other parts of the world; and, on the other hand, we have left our colonies free to provide themselves with the products of other countries than our own, and to impose upon the manufacturers of Great Britain equal duties with those imposed on foreign manufacturers."(30)

Prior to this fiscal revolution it was not possible for any of the legislatures of the B.N.A. provinces to enact legislation in contravention of fiscal legislation enacted by the Imperial Parliament; not possible for any of the legislatures to reduce the differentials of the British Possessions Acts, which afforded British manufacturers a precedence over foreign imports into the colonies. Fiscal enactments of the provincial legislatures were always subordinate to tariff legislation of the Imperial Parliament. Attempts by the provinces at legislation in opposition would have to run the gauntlet of the colonial governor, with his veto power, and the British Board of Trade who, through the Colonial Office would advise the Cabinet, who in turn would advise

disallowance. As an example of the instructions given the colonial governors in these matters, Porritt quotes the following from the instructions of 1842:

> "The governor will therefore exercise all the legitimate influence of his office to prevent the introduction into the colonial legislature of any law by which duties may be imposed on goods in reference to their place of production..."(31)

It was assumed by the Board of Trade, the Colonial Office and the Imperial Parliament that the colonies, given a certain amount of fiscal freedom by the Enabling Act of 1846, would adopt the Imperial fiscal policy of free trade as their own. It was not imagined that they would use this freedom to enact protectionist duties, least of all against British manufacturers. The enabling Act had empowered the colonial legislatures only to repeal the tariff act passed by the Imperial Parliament for the colonies in 1843; no other fiscal power was given to them. However, with the complete and firm establishment of responsible government by 1849, evidenced by the Rebellion Losses Act, began to conflict between the Colonial Office and the colonies over the fiscal policy of the colonies.

The first conflict occurred in 1850 when the legislature of the United Provinces, to facilitate reciprocal free trade between the B.N.A. provinces, enacted a tariff with differential customs duties. Although Grey, then Colonial Secretary, protested, he declined to go all the way to asking the Cabinet

to advise withholding Royal assent to the Act.(32)

In 1858, the legislature of the United Provinces enacted the first protectionist tariff in any part of the Empire after the free trade policy had been adopted. This tariff, the Cayley Tariff, although applicable against all comers, British or non-British, seems to have escaped the attention of the Colonial Office. A still more protectionist tariff was the Galt Tariff of 1859 which did not go unnoticed but which the Imperial Parliament was forced to accede to as Galt declared that colonial self-government meant nothing if it did not include fiscal freedom. Porritt observes:

> "By the time the legislature of Upper and Lower Canada determined to establish a national policy for these provinces, determined to protect manufacturing in Canada from all outside competition, British as well as American, responsible government was so firmly established and so unassailable that Galt and his colleagues of the Conservative Government at Toronto were perfectly certain that they took no risks when they intimated to Newcastle and to the Palmerston Government that the only alternative to acceptance of the Tariff Bill was military rule for the United Provinces."(33)

The combination of the grant of responsible government and the fiscal revolution in the Empire led then to tariff autonomy in the self-governing colonies. The fact that the

colonies would have fiscal policies different from those of the United Kingdom meant that the old system of commercial treaties entered into by the United Kingdom, without consultation with nor consent of the colonies, but binding nevertheless on the whole Empire, would have to give way to individual agreements designed to best suit the needs of the individual colonies. From this there logically followed that advice respecting those needs had to come from those best suited to judge the same, i.e. colonial representatives would need to associate themselves with British officials in the negotiation of commercial agreements applicable to the colonies. The colonial legislatures therefore began requesting, if not demanding, the privilege of such association.

The first suggestion from any colony, that in treaty negotiations in which the colony was directly interested it should be directly represented, had come in 1848 when the government of the United Provinces urged that in the reciprocity negotiations proceeding at Washington there should be direct communication between Washington and Montreal, the seat of the government of the United Provinces. Three representatives of that government did associate themselves, unofficially, with the British Minister at Washington in 1848 and 1849.

In 1850, New Brunswick, by a resolution of its House of Assembly, claimed direct representation in negotiations for commercial treaties and the following is part of that resolution:

> "... the withdrawal of all protection by the mother country, and the placing of the trade

> and productions of the colonies on the same footing as that of foreign nations in the British markets is disastrous and utterly ruinous to this province as a colony, unless full power is conceded to the colonies to treat with foreign nations on all subjects of trade and shipping, and without which the assertion that the colonies should be at liberty to trade with all parts of the world in the manner which might seem to them most advantageous is a mockery and a delusion."(34)

The British Minister at Washington in 1858-1864, Lord Lyons, repeatedly showed his disdain for colonial representatives but with his departure and the denunciation of the reciprocity agreement of 1854 by Washington in 1865, a new era dawned. In response to a claim by the United Provinces for direct representation in the negotiations for a new reciprocity treaty, the Colonial Office suggested the organization of an inter-provincial council of trade to formulate the views of all the B.N.A. provinces on the negotiation of commercial treaties. The council, convened at Quebec in 1865, by resolution asked the Home Government to authorize members of the council, or a committee of them, to go to Washington, confer with the British Minister and advise him of the needs of the B.N.A. provinces. Lord Lyons' successor, Sir Frederick Bruce, had no objection to diplomatic association with Canadian representatives and the authorization was promptly secured through the Colonial Office. In 1866, Galt and three

other delegates from the provinces went to Washington and, with Bruce's aid, were introduced to the Secretary of the Treasury and conferred with the Committee on Ways and Means of the House of Representatives, the committee with which tariff and internal revenue bills originated. Bruce was kept informed of their interchanges with the committee and, not satisfied with what the committee was willing to give, the delegates advised Bruce not to enter the agreement proposed by the committee.

The council had also asked that the provinces should be allowed to open communications with Spain, Brazil and Mexico and that provincial representatives be allowed to conduct negotiations with them. A dispatch from the Foreign Office in 1865 defined the conditions under which it would sanction and facilitate visits of provincial representatives to countries with which they desired commercial agreements. The position of colonial representatives was stated as follows:

> "... the agents who may be sent from the British North American colonies will not assume any independent character, or attempt to negotiate or conclude arrangements with the governments of foreign countries but will only ... be authorized to confer with the British Minister in each foreign country, and to afford him with information with regard to the interests of the British North American provinces."(35)

The first instance of formal association of a colonial representative with a British Minister in negotiating a treaty came in 1871 when John A. Macdonald was appointed by her Majesty as one of her plenipotentiaries to negotiate the Treaty of Washington. Full Powers were issued to him under the Great Seal of the United Kingdom. The treaty was primarily to settle disputes between the U.S.A. and the U.K. arising out of the American civil war and attempts by Macdonald and the British Minister to negotiate a new reciprocity treaty between Canada and the U.S.A. were subordinate to the same and unsuccessful. Although Macdonald was not allowed into all the meetings that took place, he did sign the treaty along with the British Minister. It should, of course, be remembered that Macdonald was a British plenipotentiary and not Canadian. George Brown in 1874 was appointed by her Majesty as one of her plenipotentiaries to negotiate a treaty with the U.S.A. concerning commerce, navigation, and fisheries; the negotiations were unsuccessful. In 1879 the British Government agreed to the appointment of a High Commissioner as an official representative of the Dominion Government to reside in London and advise the British Government of its views concerning, among other things, commercial treaties affecting Canada. Galt, the first High Commissioner, was associated with the British Ambassador at Madrid to negotiate a reciprocity treaty with Spain. In the negotiations Galt was forced to take a decidedly secondary position and all his negotiations with the

Spanish Government were required to be filtered through the British Ambassador. These negotiations failed and in 1884, Sir Charles Tupper, then High Commissioner, was appointed co-plenipotentiary with the British Ambassador for the renewal of such negotiations. Tupper pressed for more power to be given to the Dominion representative and such was conceded by the Foreign Office as noted in their letter to him:

> "If the Spanish Government are favourably disposed, the full power of these negotiations will be given to Sir Robert Morier and Sir Charles Tupper jointly. The actual negotiations would probably be conducted by Sir Charles Tupper, but the convention, if concluded, must be signed by both plenipotentiaries."(36)

Although the negotiations had been unsuccessful, a significant recognition of co-ordinate power in the High Commissioner with the British Ambassador was achieved. In the negotiation of the treaty of 1888 with the United States for a settlement of fisheries and boundary disputes, Tupper had co-equal power with his colleagues of the British Commission. Tupper signed with the other plenipotentiaries but the treaty failed of ratification by the United States. Tupper was associated with the British Ambassador in Paris for the negotiation of the French-Canadian reciprocity treaty of 1893. Both plenipotentiaries signed the treaty but, as in 1888, Tupper was the

dominant partner in the negotiations.

The Dominion Government had come a long way toward the achievement of independent treaty-making but the following conditions persisted: Tupper signed the treaty as representing the Imperial Government; the agreement was not between France and Canada but rather was styled an "Agreement between Great Britain and France, for regulating the Commercial relations between Canada and France in respect of Customs Tariffs"; Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the President of France were the contracting parties. The Agreement did provide, however, that it was not to be ratified until approved by the Canadian Parliament; such approval was given by the French Treaty Act, 1894.(37)

In 1895 we see an attempt by the Colonial Office to curb the powers the Dominion Government had been claiming, in fact exercising, in the negotiation of commercial treaties. A statement of the policy of the Home Government was sent by Ripon, Colonial Secretary, to the governors in all colonies with responsible government. According to Ripon:

> "A foreign power can only be approached through Her Majesty's representative, and any agreement entered into with it affecting any part of Her Majesty's dominions is an agreement between Her Majesty and the sovereign of the foreign state; and it is to Her Majesty's government that the

> foreign state would apply in case of any question arising under it. To give the colonies the power of negotiating treaties for themselves without reference to Her Majesty's government would be to give them an international status, as separate and sovereign states. ... The negotiation...must be conducted by Her Majesty's representative at the court of the foreign power (who)...should have the assistance either as a second plenipotentiary or in a subordinate capacity, as Her Majesty's government think the circumstances require, of a delegate appointed by the colonial government."(38)

That this attempt was unsuccessful may be seen when one considers the next negotiation of a treaty of an exclusively commercial character in which Canada alone was concerned. In 1907, Laurier, Premier of Canada, Fielding, Minister of Finance, and Brodeur, Minister of Marine and Fisheries, went to Paris to negotiate a second reciprocity treaty with the French Republic. The British Ambassador in Paris, Sir Francis Bertie was told in a dispatch from Sir Edward Grey, Secretary of State for Foreign Affairs, that the negotiations were to be left to the Canadian ministers who would keep him informed of their progress. The British Amabassador's role was purely formal, at the opening and closing stages, and all the negotiations were left to the Canadian plenipotentiaries. Full powers were given to the British Ambassador and the Canadian delegates to sign the treaty after

the draft had been approved by the Colonial Office and the Board of Trade. Ratification followed approval by both the British and Dominion governments. It should be noted that Fielding and Brodeur were not plenipotentiaries of the Dominion Government but of His Majesty. The agreement was styled a Convention regulating the Commercial Relations between Canada and France.

While we have seen the growing participation of the Dominion in the making of commercial treaties it was not until the conclusion of the First World War that they took any part in political treaties. In 1919 the Dominions were given the right to participate, admittedly to a limited extent, in the negotiations at the Paris Peace Conference. The United Kingdom representatives signed the Treaty of Versailles for the Empire generally and the Dominion representatives signed for the parts of the Empire they represented. The Treaty was concluded with the British Empire as high contracting party. The full powers which were issued to the Dominion representatives were prepared in the British Foreign Office and passed under the Great Seal of the United Kingdom. They were issued as a result of a Dominion Order in Council advising His Majesty to appoint certain designated Dominion representatives as plenipotentiaries to conclude the treaties in question and to sign them for His Majesty in respect of the Dominion concerned. The Treaty was not ratified by the King until the Parliaments of all the Dominions had passed resolutions approving the ratification and advised His

Majesty of the same. In each Dominion, both Houses of Parliament adopted a resolution approving the Treaty. The resulting Canadian Order in Council stated that the Governor-General in Council "is pleased to order and doth hereby order that His Majesty the King be humbly moved to approve, accept, confirm and ratify the said Treaty of Peace."(39)

The Dominions, by the Annex to the Covenant of the League of Nations were declared to be Original Members of the League and as such were therefore Original Members of the International Labour Organization. In exercising their separate membership in the I.L.O. and in the ratification of their draft conventions the Dominions acted directly and without even formal intervention of the Imperial Government or of the King himself.

In 1923 a procedure similar to that involved in the 1907 reciprocity treaty with France was followed when a commercial treaty with Italy was signed by one British and two Canadian representatives, all three being appointed plenipotentiaries by His Majesty, entitled a "Commercial Convention between Canada and Italy."

In 1923 the Canadian government, by telegram from the Governor General to the Colonial Secretary, requested that the Secretary of State for Foreign Affairs have full powers issued to Ernest Lapointe, Secretary of State for External Affairs for Canada, to enable him to sign the Halibut Fisheries Treaty with the United States. Such full powers were issued and the British

Ambassador at Washington was instructed to sign the treaty with Mr. Lapointe. Objection to this latter instruction was taken by the Dominion Government and the British Ambassador was therefore instructed by the British Government not to sign the treaty. This was therefore the first time that a treaty on behalf of a Dominion was signed solely by the representative of that Dominion. The agreement was in the Heads-of-States form with His Majesty as the high contracting party, full powers, without geographical limitation, were issued by the King and passed under the Great Seal of the United Kingdom, and ratification was by His Majesty under the Great Seal. In the United States Treaty Series it is entitled a "Convention between the United States and Great Britain"; in the United Kingdom Treaty Series it is entitled a "Treaty between Canada and the United States."

At the Imperial Conference of 1926, the practice of using the British Empire as high contracting party, as was done in the Treaty of Versailles, was condemned as "...suggesting that the Dominions and India are not on a footing of equality with Great Britain as participants in the treaties in question..."(40) A return to the Heads-of-States form was advocated with the treaty in each case indicating the part of the Empire on behalf of which His Majesty was acting. Actually we can regard this as a formulation of existing practice as we have seen the Heads-of-States form used in the Halibut Fisheries Treaty and in the Convention of June 6, 1924, for suppressing smuggling operations

between Canada and the United States, His Majesty was the high contracting party and it was indicated in the preamble that he was a party only in respect of the Dominion of Canada.

In 1928 Mr. Lapointe, Secretary of State for External Affairs, signed and sealed the instrument of ratification by which Canada became a party to the International Radio Telegraphic Convention of 1927 and the Privy Council impliedly recognized this mode of ratification in Re Regulation and Control of Radio Communication.(41)

The Treaty for the Renunciation of War, 1928, was concluded in a form according to the resolutions of the Imperial Conference of 1926; Heads-of-States form, His Majesty as high contracting party for all the members of the Commonwealth, noted in the preamble that His Majesty appointed separate plenipotentiaries "For the Dominion of Canada", "For the Commonwealth of Australia", etc. Ratification by His Majesty was effected by some seven separate instruments, each instrument showing that by that instrument His Majesty was ratifying only "in respect of our Commonwealth of Australia", or "in respect of Our Dominion of Canada", etc. The instrument of ratification of Canada was delivered by the Dominion Government's Minister in Washington.

The London Naval Treaty of 1930 was concluded in the same form as the Treaty of 1928 with the representatives of the Dominions signing along with the representatives of Great Britain. Ratification of the Treaty was by His Majesty in respect of each and all of the Members of the British Commonwealth.

In the foregoing we have seen the growing demand for, and gradual assertion of, power in the Dominion Government first to be represented in the negotiations of any treaty affecting Canada and its provinces, then to sign such a treaty along with the representative of the government of the United Kingdom, then to take the leading role in the negotiation of commercial treaties and finally in 1923 the power to sign a treaty alone. We have seen the Dominion Government's representatives accorded the privilege of participating in the Peace Conference and signing the resultant political treaty on behalf of Canada. We have seen, from the correspondence respecting the signature of the Halibut Fisheries Treaty and the approval of the procedure followed by the Imperial Conference, that, at least by 1923, the Dominion Government acted independently of the United Kingdom Government in advising the Crown in the exercise of its prerogative in foreign affairs. We see at the Imperial Conference of 1923 the recognition and approval of the practice of intergovernmental agreements, where the intervention of the Crown was not necessary. Still, however, the Royal Prerogative of treaty-making resided with the Crown in England.

Although the name of the Great Seal of the United Kingdom was changed in 1922 to Great Seal of the Realm, this was still a symbol of the retention of the Royal Prerogative in the Crown in England and, to many, a symbol of the United Kingdom Government's authority over the Dominions. The Great Seal authenticated the King's signature and was essential to its

validity; it was therefore necessary to the proper completion of a treaty concluded in Heads-of-States form. The Great Seal was in the keeping of the Lord Chancellor and released only under the authority of a Royal Warrant. The Warrant was signed by His Majesty, authenticated by the Fixing of the Signet and countersigned by the Minister responsible for tendering the advice to which the document was to give effect, e.g. the Secretary of State for Foreign Affairs, where the document was the instrument signifying the issue of full powers to a Dominion plenipotentiary or the instrument of ratification of a Dominion treaty.

In the Bonanza Creek Case[42] in 1916 counsel argued that all prerogatives necessarily incidental to the conduct of an independent state by that time resided in Canada. Lord Holdane pointed to sec. 9 of the B.N.A. Act declaring the executive government and authority over Canada to continue and be vested in the Queen, and also to secs. 14, 15 and 16 as evidence that counsel's argument was invalid. He noted that there was nothing in the B.N.A. Act corresponding to sec. 61 of the Australian Commonwealth Act which provided that the executive power, though declared to be in the Sovereign, was yet to be exercisable by the Governor General, Lord Holdane referring to the above sections of the B.N.A. Act remarked as follows:

> "These and other provisions of the British North America Act appear to preserve prerogative rights of the Crown which would pass if the scheme

> were that contended for, and to negative the theory that the Governor General is made a viceroy in the full sense, and they point to the different conclusion that for the measure of his powers the words of his commission and of the statute itself must be looked to."

The Inter-Imperial Relations Committee in its report to the Imperial Conference of 1926 stated the then position of the Governors General:

> "In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government."(43)

The Seals Act,(44) a Canadian statute passed in 1939 provided that any document which was theretofore necessarily issued by and in the name of the Queen and passed under the Great Seal of the Realm could now be issued by and with the authority of the Queen and passed under the Great Seal of Canada. The Governor General in Council was empowered to make orders and

regulations governing the procedure for the use of the Seal and for the issuance and countersignature of documents under the sign manual. By this Act the Dominion would be able to bypass the channel of communication to the Crown then existing, i.e. through the United Kingdom's Secretary of State, and thus eliminate the last element of control of the United Kingdom Government.

With the appointment of a new Governor General for Canada in 1947 new Letters Patent were issued by the King. Clauses 2 and 3 of these Letters Patent read as follows:(45)

> "2. And we do hereby authorize and empower our Governor General with the advice of our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to us in respect of Canada..."
>
> "3. And we hereby authorize and empower our Governor General to keep and use Our Great Seal of Canada for sealing all things whatsoever that may be passed under Our Great Seal of Canada."

In the combination of the Seals Act and the terms of the new Letters Patent we see the complete devolution of the prerogatives and no one can now deny the full power in the Dominion Government to make treaties without provincial interference.

Provincial Limitations

It is submitted that not only is the power in the Dominion Government full but it is also exclusive. Although for the sake of an 'attempt' at brevity the writer omitted a number of agreements and steps in tracing the growth of treaty-making power, the reader is assured that nothing suggesting provincial powers in the field was omitted for the sake of putting forth a better argument. In the books and articles on the subject reviewed by the writer and noted in the bibliography one finds no mention of claims by the provinces for representation in the negotiation or signature of international agreements and, logically, no talk of such privileges being given to them. As the executive power of making treaties came across the seas gradually, its receptacle was always the Dominion Government and never the Provincial Governments. As the executive power was not given to anyone in Canada by the B.N.A. Act and, as illustrated above, it was always the Dominion Government designated by the Imperial Government to receive such bits of power as it deemed necessary to relinquish, when and where did the provinces ever receive such power?

M. Gerin-Lajoie says "according to the Constitution of Canada, Quebec has the power to sign international agreements dealing with matters under provincial jurisdiction."(46) Sec. 92 of the B.N.A. Act lists the matters within provincial jurisdiction but one should not lose sight of the fact that sec. 92 gives the provinces power to makes laws in relation to those matters and not power to make agreements. Legislative authority

does not necessarily carry with it executive authority. To demonstrate this it is not necessary to go farther than sec. 132 of the B.N.A. Act whereby the Dominion Parliament was given power to legislate to implement treaties but no one understood this to give the Dominion Parliament power to make treaties.

Another indication of the provinces' incompetence to make international agreements is seen in the limitation on their legislative power to enactments having their operation within the confines of the province. On the other hand, sec. 3 of the Statute of Westminster, 1931, reads:

> "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation."

This enactment of course is in recognition of the international status which had been obtained by that time by the Dominion Government. No similar privilege has to date been accorded the provincial legislatures.

The position of the Provincial Lieutenant Governors precludes the possibility of the prerogative power being delegated to them. They are appointed not by the Sovereign but by the Governor General in Council by instrument under the Great Seal of Canada.(47) They are removable by the Governor General and their salaries are fixed and provided by the Parliament of Canada.(48) There is no direct contact with the sovereign and, therefore, the Royal prerogative of treaty-making cannot direc-

tly descend upon them by any delegation through Letters Patent or usage.

It is submitted therefore that provinces wishing to enter into binding international agreements must do so with the authority and consent of the central executive.

Agreements between departments of the provincial government and departments of foreign governments are not international agreements governed by international law but rather, like agreements between provincial governments and private individuals and corporations, within the province or in other jurisdictions, are contracts whose interpretation and enforcement is governed by private international law.

O'Connell has the following to say in determining whether an agreement is a treaty, and so governed by International Law, or an agreement governed by private International Law.

> "Conservative opinion holds to the view that no agreement is a treaty unless signed with the authority of the Head of State or the Foreign Office. Generally speaking, inter-departmental agreements, that is, between corresponding government departments of two nations, are not treaties and are ordinarily subject to private law, though on occasions they may be subjected intentionally to International Law. The practice of the United

> Kingdom and the United States is to recognize as treaties only agreements negotiated through the Foreign Office or the State Department. Agreements between Ministries of Agriculture, for example are regarded as matters of private law, and Full Powers for their negotiation are not issued... It does not follow that, because agreements not negotiated between Foreign Ministries are not treaties, officials of a Ministry of Agriculture or Transport may not be qualified to sign a treaty; rather, their authorization to do so must emanate from the Foreign Ministry and take the form either of Full Powers or a letter of instructions."(49)

If the provincial executive sought by international agreement to bind not merely a department in its government but the province itself and the foreign nation with whom it contracted recognized power in the provincial executive to do the same, then the province would be well on its way to becoming a state in the full International Law sense of the word.

CONCLUSIONS

1. International Law precludes the possibility of individual provinces remaining members of the federation of Canada and entering into an international agreement intended to create legal rights and obligations, or to establish relationships, governed by International Law.
2. Canadian Constitutional Law dictates that the power to bind Canada and its provinces by international agreement is full and exclusive in the central executive with no part of it exercisable by the provincial executives.
3. The Dominion Parliament does not have unlimited power to implement all international agreements it enters into but rather needs the co-operation of provincial legislatures if the implementation requires an alteration in domestic law and the legislation necessary to effect such alteration is in the fields of legislative authority given by the Constitution to the provinces.
4. If a province does enter into an agreement with a foreign state and if the foreign state with whom it contracts accepts the fact that the province alone will be responsible for the fulfilment of the agreement then two results are possible:
    (a) The province would cease to be a member of the federation and would achieve international status. The agreement would be subject to public International Law.

(b) The province would remain a member of the federation and the agreement would be subject to private International Law.

Which result would come to pass would depend on the success of a province's assertion against the central government of independence of any control over its foreign relations and the external recognition of such independent status accorded by the family of nations.

APPENDIX I

Colonial and Imperial Conferences

(To look at the motions, comments and resolutions at these conferences is to see the change in attitudes over the years of the Home and Colonial Governments and so the change in customs which crystallize into conventions and then into constitutional law. A sampling is given below.)

Colonial Conference of 1887:

Sir Francis Dillon Bell, Agent-General of New Zealand, submitted to the Conference a Memorandum on "Negotiations with Foreign Powers in Matters of Trade". It was admitted that where a colony was desirous of entering into negotiations with a foreign country it need only apply for the necessary power and assistance and the Imperial Government would secure and provide the same. Bell, it appears, sought a general concession of power to enter into such negotiations without the need for special application being made in each instance. The other delegates to the conference expressed themselves as satisfied with the existing procedure and Bell's proposal was withdrawn.

Colonial Conference of 1894:

Sir Henry Wrixon, one of the representatives from the Government of Victoria, argued for the adoption of a resolution, favouring an Imperial Preference, and calling for imperial legislation enabling dependencies of the Empire to enter into

agreements of commercial reciprocity with Great Britain and with one another. In arguing for such freedom Wrixon pointed to a greater freedom enjoyed, in his view, by Canada and the Cape Colony; freedom to conclude commercial treaties with foreign powers. The Minister of Finance for the Dominion of Canada, George Eulas Foster, in denying that Canada possessed such freedom described the situation as he saw it:

> "If we wish to negotiate a treaty with Spain that in some respects would be beneficial to us, we simply make our request to have some person we name, associated with their ambassador, and whilst their ambassador is materially the prime mover, the negotiations are chiefly carried on by our plenipotentiary. It is an Imperial Treaty.
>
> Sir Henry Wrixon: A treaty between Great Britain and Spain.
>
> Hon. Mr. Foster: Yes, applicable to Canada ....I am of the opinion that so long as the colonial relation exists, the power to negotiate our own treaties, while we are a part of the Empire, is undesirable and impossible....I am entirely at one and so are the people of Canada, as well as the Parliament of Canada, with the sentiment that as we are all parts of one country and we are under that one Imperial Government, the imperial power must negotiate with regard to these treaties, but

> at the same time we have all the freedom that is necessary and all the voice that we could possibly desire."

Colonial Conference of 1902:

The Government of the Commonwealth of Australia urged consultation with the colonies prior to Great Britain entering into treaties which might affect them. Sir Wilfrid Laurier pointed out that such consultation had been going on already and he noted that Canada was satisfied with the existing situation.

> "In all the treaties in which we have been indirectly interested as a colony, no action has been taken that could affect us until we had been given an opportunity, either to accept or dissent from that treaty, or to present observations with regard to it."

In order to have something on the record the following resolution was put and carried unanimously:

> "That so far as may be consistent with the confidential negotiations of treaties with Foreign Powers, the views of the Colonies affected should be obtained in order that they may be in a better position to give adhesion to such treaties."

Colonial Conference of 1907:

The following resolution was unanimously agreed to:

> "That all doubts should be removed as to the right of the self-governing Dependencies to make

> reciprocal and preferential fiscal agreements with each other and with the United Kingdom, and further, that such right should not be fettered by Imperial Treaties or conventions without their concurrence."

Imperial Conference of 1911:

The following resolution, moved by Sir Wilfred Laurier, was unanimously agreed to:

> "That His Majesty's Government be requested to open negotiations with the several foreign governments having commercial treaties which apply to the Oversea Dominions with a view to securing liberty for any of those Dominions which may so desire to withdraw from the operation of the Treaty without impairing the Treaty in respect of the rest of the Empire."

Imperial Conference of 1923:

The procedure followed by Canada in the negotiation and signature of the Halibut Fisheries Treaty of 1923 was approved and it was unanimously resolved that it should be followed in the future. Part of the resolution concerning the procedure to be followed in concluding treaties in the form of Heads of States reads as follows:

> "Bilateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the government of that part.

> The Full Power issued to such representative should indicate the part of the Empire in respect of which the obligations are to be undertaken..."

The Conference also recognized the practice of agreements made between governments as opposed to agreements between Heads of States, and resolved as follows:

> "Such agreements, which are usually of a technical or administrative character, are made in the names of the signatory governments, and signed by representatives of those governments, who do not act under Full Powers issued by the Heads of States; they are not ratified by the Heads of States, though in some cases some form of acceptance or confirmation by the governments concerned is employed. As regards agreements of this nature the existing practice should be continued..."

Imperial Conference of 1926:

This Conference laid down the principles (the Balfour Declaration) which were to bring about the Statute of Westminster, 1931. The Balfour Declaration is contained in the Report of the Inter-Imperial Relations Committee an extract of which reads:

> "... we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in

any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

APPENDIX II

Judicial Decisions

Although we do note have an explicit judicial pronouncement on the location of the executive power of entering into treaties binding on Canada and its provinces, it was thought worthwhile to note what in fact has been said by the Courts on the matter.

Labour Conventions Case[1]

The Supreme Court of Canada being evenly divided on the issue of whether the Federal Parliament could enact legislation implementing conventions of the International Labour Organization adopted by it, appeal was taken to the Privy Council. The Privy Council decided that the Federal Parliament did not have unlimited power to enact legislation to implement a Canadian treaty as opposed to an Empire Treaty. Finding that treaty legislation power did not exist in the distribution of powers in the B.N.A. Act the Privy Council filled the void with the principle that "as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained". The Privy Council stated that it chose not to decide the question of where the executive power of negotiating and entering into treaties resided.

Although the Privy Council chose not to decide the question, the inferences in their judgment point unmistakably to the power residing in the Federal Parliament. The judgment notes the two steps

in the treaty process, entering into the treaty and performing its provisions, points out that performance may have to be undertaken by different legislatures and says:

> "... and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation."(2)

The "executive" they refer to must be the central executive. Again, in speaking of Canada's new international status, they remark:

> "... it follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions."

The "increase in the scope of its executive functions" must refer to the Dominion Parliament's power to make treaties. That the Privy Council recognized such power in the central executive is obvious in the following statement:

> "... the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth."(3)

In the Supreme Court of Canada, although the justices were evenly divided, 3:3, over whether the implementing legislation was ultra vires the justices split 4:2 in favour of the central

executive having treaty-making authority. Thus Crockett J., while holding the legislation ultra vires, said:

> "While I agree with the learned Chief Justice that the Government of Canada must now be held to be the proper medium for the formal conclusion of international conventions, whether they affect Canada as a whole or any of the provinces separately..."(4)

Chief Justice Duff denied the argument of the provinces that the Dominion Government had no power to conclude international agreements and pointed out that the Imperial Conference of 1926,

> "categorically recognizes treaties in the form of agreements between Governments in which his Majesty does not formally appear, and in respect of which there has been no Royal intervention."
> "Constitutional law consists very largely of established constitutional usages recognized by the Courts as embodying a rule of law. An Imperial Conference, it is true, possesses no legislative authority. But there could hardly be more authoritative evidence as to constitutional usage than the declarations of such a Conference."(5)

Duff, C.J. felt the time had come when the usages embodied in the Resolutions of the Imperial Conferences "must be recognized by the Courts as having the force of law."

Referring to the executive authority of the provinces Duff C.J. states:

> "In regards all such international arrangements, it is a necessary consequence of the respective positions of the Dominion executive and the provincial executives that this authority resides in the Parliament of Canada. The Lieutenant-Governors represent the Crown for certain purposes. But, in no respect does the Lieutenant-Governor of a province represent the Crown in respect of relations with foreign governments. The Canadian executive, again, constitutionally acts under responsibility to the Parliament of Canada and it is that Parliament alone which can constitutionally control its conduct of external affairs.(6)

Scott Case(7)

In this case the Reciprocal Enforcement of Maintenance Orders Act,(8) an Ontario Statute, was attacked as being ultra vires the Ontario Legislature as being in the nature of an international agreement. The Supreme Court of Canada held the legislation intra vires because the arrangement, by reason of which the statute was enacted, was not a treaty as there was nothing binding in the scheme, which consisted merely of voluntary and complementary enactments of two legislatures. Because the legislation was not in furtherance of an international agreement it was held to be within the power of the provincial legislature.

It is obvious from the words of the various justices who took part in the decision that treaty-making authority resided in the Parliament of Canada and that not a bit of it resided in the provincial legislatures. Locke J. at p. 444 said:

> "A further objection to the validity of the statute was that the adoption of this statute and of similar legislation by other reciprocal states indicates that an agreement had been made between the Province and such states to legislate in this manner, and so was an entry by the Province into matters of international comity and amounted to a treaty. The short answer to this contention is that there is no evidence to suggest that any such agreement existed, and that the legislation may be repealed at any time by the Legislature which enacted it. No agreement to the contrary by the Province, even if it could be suggested that any such agreement had been made, would have any legal effect."

In the judgment of Abbott J. agreeing with the view expressed by the Chief Justice in the Court below we read:

> "I am unable to see any valid legal reason why the Province of Ontario cannot, in relation to a subject-matter within its legislative jurisdiction, make a reciprocal arrangement with another Province or a foreign state in relation to such subject-

matter. It is not, in my opinion, the exercise of any treaty-making authority vested in the Parliament of Canada."

APPENDIX III

Survey of Departmental Practice

Department of Education

Person Interviewed: A. W. Bishop, Registrar

Teacher Exchange

Exchanges are arranged for Ontario teachers with teachers in other provinces, the United Kingdom, and the United States.

Applicants, with permission of their own school board, apply to the Teacher Exchange Officer, A. W. Bishop, who, if satisfied with their credentials, forwards the application to the Canadian Education Association. The Secretary of the C.E.A., C. Routley, deals directly with the Director of the League for Exchange of Commonwealth teachers in England, Mr. Bell, or with Mrs. Stewart of the Department of Health, Education and Welfare in the U.S. or with the Teacher Exchange Officers in the other provinces. Between them they try to 'match pairs'. The applicant receives his salary from his own School Board which remains subject to the usual deductions for superannuation contributions and income tax. The School Board continues its contribution to superannuation while the teacher is abroad.

From the above it is obvious that, not only are there no agreements between the Department and Departments of Education in other jurisdictions, there is no contact between them. All arrangements are made through the Canadian Education Association.

Foreign Teachers Qualifications

To obtain a teaching position in Ontario a foreign teacher is required to obtain a Letter of Good Standing from the Department. The teacher is required to show academic qualifications equivalent to an Ontario teacher and equivalent teacher training. The Registrar writes directly to the teacher's former school board for a certificate that the teacher left in good standing with that board. Similarly, requests from foreign jurisdictions respecting teachers' qualifications are filled by the Department and local school boards.

It is obvious that under this system there is no requirement for agreements for across-the-board recognition of qualifications of teachers from other jurisdictions but that the matter is dealt with on an ad hoc basis.

Teacher Education Branch

Person Interviewed: G. L. Woodruff, Assistant Director.

Each year students come from Bermuda (300 since 1941), Nigeria, and Trinidad to take the course prescribed by Ontario for public school teachers to enable them to teach in their own country. The fees for the course are paid by the students themselves although often reimbursed by their home countries.

Arrangements for their admittance are very informal. The Minister of Education of the foreign country will deal by phone, letter or sometimes visits with the Ontario Minister of Education. No agreements are deemed necessary and the Ontario Minister merely reviews each request and informs his counterpart of how many pupils they are prepared to accommodate each year.

Teachers to Foreign Countries

The provision of Ontario trained teachers for the new nations of Africa is handled by the External Aid Branch of the Department of External Affairs.

Department of Lands and Forests

Person Interviewed: G. Ferguson, Chief of Law Branch.

Mr. Ferguson points out that his Minister's instructions to the Department are that all agreements, of any kind, are to be filed with the Law Branch. He knows of no agreement entered into by the Department with a corresponding department in any of the United States or in any of the provinces.

There is American legislation permitting reciprocal agreements and compacts between individual states and bordering provinces for the prevention and control of forest fires. (1949, 63 Stat. 271, 1955, 69 Stat. 66) Mr. Ferguson said he was unaware of such legislation but that a few years ago the Department had looked into what would be involved in making such agreements with contiguous states. They decided that the present working arrangements, without agreements, were quite satisfactory and that little benefit could be gained for the amount of trouble involved in working out such agreements.

Mr. Ferguson produced a list of well over 100 committees assisted by head office personnel of the Department to indicate the many conferences and meetings at which personnel from the Department meet with, and discuss common problems with, their counterparts in other provinces and states. As a result of these encounters the various jurisdictions may follow similar courses of action and enact similar legislation on the recommendations

of their representatives. Co-operation, then, does take place but without the necessity of written agreements.

Department of Highways

Persons Interviewed: J. Walter, Director of Design
W. Bidell, Director of Planning
D. A. Crosbie, Director of Legal Branch

Standardization of Traffic Signs

There exist no agreements between Ontario and other provinces or states respecting common traffic signs. The Department does adopt certain signs used in the United States and prescribed by their Bureau of Public Roads for the simple reason that "they've been at it longer." Similarly various states copy the Department's signs.

Association, Conferences, etc.

Representatives of the Department do belong to various associations and attend numerous conferences, both national and international, e.g. of the Canadian Good Roads Association. These conferences permit the exchange of technical information but the representatives have, of course, no power to bind their respective jurisdictions to any future courses of action. At the most they can, on their return, recommend the adherence to suggested modes of conduct.

At various meetings the Departments of Highways of bordering states and provinces will unveil their plans for road building but while the plans of the bordering jurisdiction are bound to influence their own plans they have not entered into agreements in this area except with respect to international bridges.

International Bridges

Mr. Crosbie examined all the files of the Department relating to international bridges and set out in a memorandum a resume of these bridges in which the Department had accepted or been given some responsibility.

The only bridge involving an agreement by the Department with a bordering state was the bridge built at Pigeon River. In this instance an agreement was entered into by Her Majesty the Queen in Right of Ontario as represented by the Minister of Highways with the State of Minnesota as represented by its Commissioner of Highways. The agreement concerns the construction of the said bridge and terms of payment for the same. Enabling Federal legislation was passed by Canada (C.S. 1959, Ch. 51) and section 3 of the Pigeon River Bridge Act reads, in part,

> "The Province of Ontario may, with the approval of the Governor in Council, enter into an agreement with the State of Minnesota for the construction, operation and maintenance of a bridge across the Pigeon River..."

A subsequent agreement was entered into, providing for the continuing maintenance of the structure, by an exchange of letters between the Minister of Highways of Ontario and the Commissioner of Highways of Minnesota. The agreement for the construction of the bridge was approved by federal order-in-council, February 23, 1961.

This technique must be considered the exception to the

rule and the usual procedure is spelled out in a Report by the Department to the County Bridge Committee respecting a Proposed International Bridge at Kingston. Concerning the necessary legislation the report reads:

> "An international bridge requires close co-operation and agreement between the two sovereign states. The respective governments of Canada and the United States have sole jurisdiction in respect of international obligations entered into on behalf of their nations and thus the Government of Canada must sanction by legislation any undertaking which necessitates an agreement with the United States or any agency thereof. The Government will also have to give consideration to the nature and constitution of any body that may be authorized to construct and operate an international bridge."

Department of the Attorney-General

Criminal Law Division

Person Interviewed: G. K. Booth, Administrative Officer

Requests often come in from foreign countries for assistance by the Department in obtaining evidence on commission from possible witnesses resident in Ontario, to civil and criminal actions in those foreign countries. The requests often come directly from the consulate to the Lieutenant Governor and sometimes through the Department of External Affairs. Requests

by the Department for similar assistance from foreign countries are processed through the Department of External Affairs. No agreements for such co-operation are in effect nor considered necessary.

This division is charged with the responsibility of administrating the Reciprocal Enforcement of Maintenance Orders Act which arrangement, of course, received judicial sanction in the Scott case.

Emergency Measures Organization

Person Interviewed: R. Stock, Deputy Director

The Ontario Provincial Government has not entered into any agreements with bordering states. Since they are planning for possible nuclear attack Mr. Stock pointed out that it would be "ridiculous to plan in isolation with a bordering state - co-ordination must occur at the Federal level."

On November 15, 1963, Canada and the U.S. entered into the Agreement on Civil Emergency Planning. The agreement between the two federal governments took the form of an exchange of notes between Paul Martin, Secretary of State for External Affairs and W. W. Butterworth, the U.S. Ambassador. Under the agreement a Joint Planning Civil Emergency Committee was constituted with delegates to the Committee from both sides of the border. This Committee, which meets twice a year, alternately in each country, has the task of planning for a maximum degree of cross-border emergency operational readiness. The agreement does not provide for any formal conclusion of pacts between provinces or states or between municipalities,

and Mr. Stock assures me that to date Ontario has not seen fit to enter into any agreements with its neighbours.

Mr. Stock mentioned that Quebec has an agreement with New York State in this area. On examination the 'agreement' turns out to be a 'Memorandum of Understanding between Quebec and New York State re Mutual Aid in Civil Defense Activities.' The Memorandum reads, in part:

> "...to implement the intent of the U.S/Can. Joint Civil Emergency Planning Agreement dated Nov. 15, 1963."

Mr. Stock points out that the Joint Committee has urged that the provinces and states enter into such 'agreements' and that Ontario will probably do so in the future.

R. A. Copeland of the Civil Law Division of the Department conducted the following interviews and reported the results to me.

Ontario Provincial Police

Person Interviewed: T. H. Trimble, Deputy Commissioner

There exists a 'wonderful co-operation with police forces of other states' with a constant intermingling of top police officials at various conferences. As an example of such co-operation Trimble noted that State Police are able to teletype directly to O.P.P. headquarters for fingerprint checks and such requests are treated as if they came from an O.P.P. detachment. Despite the existence of widespread co-operation there are, according to Trimble, no written agreements between the various police forces.

Fire Protection Branch

Person Interviewed: M.S. Hurst, Fire Marshall.

Unlike the O.P.P. there is little or no need for co-operation at the province-state level and accordingly no agreements have been entered into by the province in the area of fire protection. Hurst did note that certain border municipalities, e.g. Niagara Falls and Fort Erie, do co-operate in this area, e.g. adaptors available to allow each to use the other's equipment, but there are no agreements setting out the basis of such co-operation.

The Hydro-Electric Power Commission of Ontario

Person Interviewed: R.H. Hillery, Director of Operations.

Export of Power

Up until the past few years it was considered bad politically to export power; i.e. Canada's heritage, potential, keep power at home to attract industry. In fact, until 1961 there existed an export tax on power; in that year, $2 per HP year or .03¢ per kilowatt hour. This attitude has changed with the realization of large power resources going unused and, unlike other resources capable of being saved for future use, being literally wasted.

Federal legislation has always governed the export of power; the Exportation of Power and Fluids and Importation of Gas Act, a Canadian statute enacted in 1907, repealed in 1959 and replaced with the National Energy Board Act, S.C. 1959 c. 46. The Act presently prohibits the export of power from Canada without a licence issued by the Federal Board. The U.S. Federal

Power Commission exerts similar authority over American producers.

The Board can grant a licence up to 25 years duration and the applicant seeks a licence for whatever period it desires. The Board's policy is aimed at safeguarding Canadian industry and applications for a licence to export firm, as opposed to interruptible, power, will be refused unless it can be demonstrated and guaranteed that the quantity to be exported,

> "...does not exceed the surplus remaining after due allowance has been made for the reasonably foreseeable requirements for use in Canada..." S.C. 1959, c. 46, sec. 83(a).

The Board also seeks to guard against the export of power to a small locality which could become so dependent on such power that an interruption would be considered an unfriendly act.

In 1950 the 'Treaty between Canada and the United States of America concerning the Diversion of the Niagara River' was signed at Washington. The agreement provided that the two countries would share equally in the total flow diverted from the Falls after certain minimums were allowed over the falls for aesthetic purposes.

With the above background in mind it is easier to understand the actual operations. The Control Dam at Niagara regulating the flow over the falls is operated by Ontario Hydro. The costs of maintaining and operating the Control Dam are shared equally between Ontario Hydro and the Power Authority of the State of New York, both agencies of their respective

governments. Similarly, Ontario Hydro operates the Iroquois Dam on the St. Lawrence and the costs are shared by the two above entities. The terms of operation and payment for same, together with provision of inter-connection facilities for the interchange of power are reduced to a Memorandum of Understanding between the Authority and the Commission. The Memorandum is executed by the parties attaching their corporate seals attested by the Chairmen and Secretaries of the parties. It is a most formal document. Section 800 of the Memorandum reads:

> "The agreements and obligations expressed herein are subject to the initial and continuing governmental permission to Authority and Hydro to establish, operate and maintain the inter-connection herein specified, and export energy under the terms of this memorandum."

The Memorandum's duration is stated to be 25 years. The Memorandum contains recitals of the requirements of the Niagara Treaty of 1950 and also of the requirements concerning the operation on the St. Lawrence dictated to the Authority by the International St. Lawrence River Board of Control and to Ontario Hydro by the Government of Canada through the office of the Department of Transport.

In 1953, Ontario Hydro entered into an inter-connection agreement with Detroit Edison Co. and the agreement contains a clause virtually identical with the above-noted section 800. A similar inter-connection agreement was entered into by Ontario Hydro in 1955 with Niagara Mohawk Co.

Technical Assistance

Iran - A private consulting firm from New York City, which had a contract with the Shah of Iran, sought Ontario Hydro and, as agent for the Khuzestan Water and Power Authority, entered into a contract with it for the provision by Ontario Hydro of a team of specialists to commission a generating station being built on the Dez River in Iran in the province of Khuzestan. The team's work included the training of Iranians to operate and maintain the station. The contract was signed by the Chairman and Secretary of Ontario Hydro, with corporate seal attached, and provision was made in the contract for its assignation by the private firm to the Khuzestan Authority. A term in the contract was that its interpretation was to be according to Iranian law.

With the completion of the task this year, Ontario Hydro is now about to enter into another agreement to provide expert assistance in the future if necessary. This agreement, negotiated by the Director of Operations of Ontario Hydro will be signed by the Chairman and Secretary of Hydro. There is presently a debate going on in Iran whether the agreement will be signed by the Managing Director of the Khuzestan Authority, who is also the Governor-General of the Province, or by the Minister of Power of the central government of Iran.

Ghana - Ontario Hydro has entered into an agreement with the Volta River Authority to provide the same services for the Akosombo Dam as they provided in Iran. The agreement, negotiated by the Director of Operations of Hydro, was signed by the Chairman and Secretary of Hydro.

Nigeria - The Niger Dams Authority would like Ontario Hydro to do the same thing for their plant at Kainji. The External Aid Department of Canada may be paying for these services and at present there is discussion whether the Director of Operations will have to deal through, or report to, the Canadian High Commissioner in Nigeria or whether he can, as he did in Iran and Ghana, deal directly with the Authority.

India - Ontario Hydro has an agreement with the Atomic Energy Commission of Canada to send a team to commission a nuclear generating station at Rana Satrap in Rajasthan, India. Ontario Hydro is presently training 35 engineers from India at their Nuclear Training Centre near Deep River. With respect to India then, Hydro deals through and is paid by A.E.C.

Department of Transport

Person Interviewed: R. H. Humphries, Executive Director of Services.

The following pieces of legislation were turned up and Mr. Humphries then asked as to their origin, that is, whether the legislation was enacted pursuant to any agreement entered into by the province.

The Highway Traffic Act, Regulation 227, sec. 10.

This section provides for exemptions from registration in Ontario of specified commercial motor vehicles operating in particular areas and modes. The section begins,

> "Every commercial motor vehicle,
>
> (a) that is registered in a reciprocating state of the United States of America that grants exemptions for commerical motor vehicles similar to the exemptions granted by this section..."

Mr. Humphries refers to this as 'mirror reciprocity'. No agreement between the province and reciprocating state is necessary. Mr. Humphries explained that he would merely write his counterpart in a particular state informing him of Ontario's legislation and asking whether that state would care to have their residents enjoy such privileges. If the state legislature enacts similar legislation its residents automatically become entitled to the exemptions provided by Ontario legislation.

The Highway Traffic Act, sec. 12.

This section provides that the requirements for registration in Ontario are not applicable to a motor vehicle owned by a person who does not reside or carry on business in Ontario for longer than,

> a) Six months, if the person is resident in another province, or
>
> b) three months, if the person is resident in one of the United States, if the owner is

> resident in a jurisdiction that grants similar privileges to Ontario residents.

This is another example of 'mirror reciprocity'. The section resulted from a conference of the Association of Motor Vehicle Administrators. The Association has representatives from provinces and states, holds meetings, regional and national, and conducts workshops. The representatives cannot agree that their jurisdictions will accord privileges to residents of other jurisdictions represented at the various meetings but they can, and do, return from the meetings with recommendations for particular pieces of legislation.

The Motor Vehicle Accident Claims Act, sec. 23.

This section provides for payment out of the Claims Fund to persons, injured in a motor vehicle accident and unable to recover, who reside out of Ontario but in a jurisdiction which provides similar relief to Ontario residents. Again no agreement was necessary and if the person claiming can show similar legislation in his state available to Ontario residents he will be automatically entitled to relief under the Act. This, then, is another example of mirror reciprocity.

The Highway Traffic Act, sec. 113 and Regulation 230

Section 113 provides for reciprocal suspension of licences in the case of unsatisfied judgments against residents of reciprocating states and provinces. Section 113(2) reads,

> "The Lieutenant Governor in Council, upon the report of the Minister that a state or province has enacted legislation similar in effect to

> subsection 1...may declare that the provisions of subsection 1 shall extend and apply to judgments...against residents of Ontario by any court...in such state or province."

Mr. Humphries noted that in this area he would write his counterpart in another state, inquire concerning their legislation and inform him of Ontario's legislation. If that state enacts similar legislation, then Humphries would notify the Minister who would secure the necessary Order in Council declaring such state entitled to the benefits of Ontario's legislation. Again, no agreement is necessary.

The Highway Traffic Act, Regulation 221, sec. 6

This section provides that the Registrar may record demerit points for a conviction in another province or state. This provision did not arise under an agreement to punish an Ontario resident on behalf of another jurisdiction but is rather a unilateral attempt by the Province to control its own drivers wherever they may be driving.

Motor Vehicle Accident Claims Act, sec. 3

This section requires the owner of a motor vehicle to produce, on request, evidence of insurance or payment of the prescribed uninsured motor vehicle fee. By subsection (4) the section is made inapplicable to vehicles registered outside Ontario. This exemption was not provided pursuant to any agreement but was a unilateral act necessary to the tourist trade.

The Department does have reciprocity agreements with its counterparts in all other provinces of Canada save Quebec

and Newfoundland. Such agreements arose out of the Canadian Conference of Motor Transport Authorities. The Conference, which meets once a year, seeks uniformity in licensing, insurance and equipment requirements. The agreements are signed by the Minister of Transport for Ontario and the appropriate Minister in the other province.

Footnotes

(1) Interview with Gerard Pelletier, Toronto Telegram, May 4, 1965.

(2) International Law, D.P. O'Connell, 1965, p. 211.

(3) A.J.I.L., Vol. 29 (1935), Supp., p. 667.

(4) U.N. Document A/CN, 4/63 (1953).

(5) Ibid, p. 101.

(6) Ibid, p. 101.

(7) U.N. Document A/cn, 4/101 (1956).

(8) McNair, The Law of Treaties, 1961, p. 37.

(9) U.N. Document A/CN, 4/63.

(10) Ibid, p. 139.

(11) U.N. Document A/CN 4/101.

(12) Ibid, p. 118.

(13) Ibid, Article 2, Draft Code.

(14) Hall, International Law, 1917, pp. 24-25.

(15) Brierly, The Law of Nations, 6th Ed., 1963, p. 128.

(16) Ibid, p. 137.

(17) Arrow River v. Pigeon Timber Co., (1932) S.C.R. 495.

(18) A. G. for Canada v. A. G. for Ontario, (1937) A. C. 326, 347-348.

(19) Hans Kelsen, Principles of International Law (1952), p. 323.
Halsbury, Laws of England (1954), vol. 7, p. 286.
Oppenheim, International Law, vol. 1 (1957) pp. 882, 887.

(20) (1937) A.C. 326, at 349-350.

(21) In re Regulation and Control of Radio Communication in Canada (1932) A.C. 304.

Footnotes (continued)

(22) In re Regulation and Control of Radio Communication in Canada (1932) A.C. 304.

(23) Att.-Gen. for Canada v. Att.-Gen. for Ontario (1937) A.C. 326, at 349.

(24) 1932 A.C. 304, p. 312.

(25) 1937 A.C. 326, p. 350.

(26) 9 & 10 Vict., c.22.

(27) 9 & 10 Vict., c.23.

(28) 9 & 10 Vict., c.94 - (Enabling Act of 1846).

(29) 12 & 13 Vict., c.29.

(30) Edward Porritt, The Fiscal and Diplomatic Freedom of the British Overseas Dominions (Oxford, 1922), pp. 2-3.

(31) Edward Porritt, op. cit. p. 57.

(32) 13 & 14 Vict., c.3.

(33) Edward Porritt, op. cit., p. 98.

(34) Edward Porritt, op. cit., p. 168.

(35) Edward Porritt, op. cit., p. 184.

(36) Edward Porritt, op. cit., p. 191.

(37) Statutes of Canada, 57 & 58 Vict. c.2.

(38) Edward Porritt, op. cit., p. 195. (Perhaps a similar communique by the Federal Government to the Provincial Governments might now be in order.)

(39) Quoted by R.B. Stewart, Treaty Relations of the British Commonwealth of Nations, 1939, p. 233.

(40) Maurice Ollivier, Colonial and Imperial Conferences.

(41) (1932) A.C. 304.

(42) (1916) 1 AC 566.

Footnotes (continued)

(43) Maurice Ollivier, Colonial and Imperial Conferences, Vol. III, p. 137.

(44) C.S. 1939 Ch. 22.

(45) W.P.M. Kennedy, 'The Office of the Governor General of Canada', (1947-48) 7 U. of T. Law Journal 474.

(46) Toronto Telegram, May 4, 1965.

(47) B.N.A. Act, sec. 58.

(48) B.N.A. Act, secs. 59 & 60; and see remarks of Duff C.J. in the Labour Conventions Case noted in Appendix II.

(49) O'Connell, D.P. International Law, (1965) p. 224.

Footnotes - Appendices

(1) (1936) 3 D.L.R. 673; 1937 A.C. 326.

(2) (1937) A.C. 326, atp. 348.

(3) Ibid, p. 352.

(4) (1936) S.C.R. 461 @ p. 535.

(5) Ibid, @ p. 476.

(6) Ibid, @ p. 488.

(7) A-G Ont. v. Scott (1956) 1 D.L.R. (2nd) 433.

(8) R.S.O. 1950 c. 334.

A Supreme Court in a Bicultural Society:

The Future Role of The Canadian Supreme Court

by Professor Edward McWhinney

June, 1965

A Supreme Court in A Bicultural Society:
The Future Role of The Canadian Supreme Court

It may be theoretically possible to have a federal constitutional system without a federal supreme court that serves in effect (in the American constitutional phrase), as "umpire of the federal system". Certainly, Imperial Germany might be considered as meeting such a test, considered now purely in terms of the positive law, as written, in the constitutional text of 1871; though it may be doubted whether, granted the fact of Prussia's undoubted political hegemony, Imperial Germany ever really amounted to a federal constitutional system, viewed now as a matter of law-in-action. What can be said, however, is that the classical federal societies - the United States, Canada, Australia, and more latterly India - where federalism has really flourished for any period of time, have all been characterised by strong final appellate tribunals, staffed, from time to time, by dominant judicial personalities, who have managed successfully to assert the power to review, and ultimately, if need be, to control, the decisions and determinations of the co-ordinate, executive and legislative arms of government.(1)

This power successfully asserted by the final appellate tribunals -- what is called judicial review of the constitutionality of executive or legislative decrees or statutes, or of the practical administration and application of those same

acts-- has had rather different historical origins in the case of all of the classical federal societies. In practice, however, this power of judicial review may have amounted to very much the same thing in all of the classical federal societies.

In the case of the classical European federal systems-- Switzerland, for example, -- the provision for a federal court, as written into the Swiss Constitution of 1874, authorises a judicial maintaining of the supremacy of the federal constitution vis-a-vis the local (cantonal) authorities; and it also looks to a judicial safeguarding of the uniform application of federal law in the cantonal courts. But the federal court's further function of safeguarding the constitutional rights of individuals is limited, in its practical exercise, by the legally unassailable position which the constitution of 1874 has assigned to the federal legislature; for no federal law can be tested by the federal court for its constitutionality. In this sense, the Swiss Constitution of 1874 conforms to more basic Continental European constitutional attitudes which would consider permitting an indirectly elected or appointive body like the federal court (whose members are in fact elected by the lower house of the federal legislature) to pass on or review laws enacted by the popularly elected representatives as counter to the democratic principle.

On the other hand, the West German (Bonn) Constitution of 1949, in defining the jurisdiction of the Federal Constitutional Court in terms sufficiently comprehensive to cover the court's passing on the constitutionality of federal, as well as

of local (Lander), laws, departs significantly from long-accepted Continental European patterns. Though there are some historical precursors for the Federal Constitutional Court's extensive powers, as conferred under the Bonn Constitution, in the special constitutional role of the courts under the Weimar Republic in the era between the end of World War I and the Nazi accession to power in 1933, the vastly new ground broken, in West Germany, in terms of constitutional jurisdiction of the courts, seems attributable in principal measure to a conscious borrowing, post-war, from American experience as a conceived ideal-type model of democratic constitutionalism.

I think that the contemporary legal scientist, in the light of this, generally acknowledged as successful, experience with judicial review, under a wide variety of conditions in widely differing societies, might well conclude that judicial review of the constitution, as exercised through a federal supreme court, is both a highly desirable, and also a necessary and inevitable, feature of any federal consitutional system of the classical variety, such as we have in Canada. For our present purposes we can at least say that some sort of arbitral, "umpiring", role seems inevitable in any federal system that wishes to remain viable in terms of territorial dispersal and decentralisation of community policy-making. And we may, I think, further confidently assert that the arguments in favour of a court, of some sort or other, to exercise this special role, are very persuasive, especially in the light of the historically

rather ambiguous Continental European experience with nominee, or else indirectly elected, federal upper houses, as purported guardians of "States' Rights"; and in the light also of the generally rather unsatisfactory performance of Continental European non-judicial bodies -- special constitutional committees of legislative bodies, -- as safeguarders of constitutionalism and constitutional rights generally, after World War II.

.....

Granted the special competence of federal supreme courts, then, as umpires of the federal constitution, the fact remains that in the classical federal systems they have varied widely in composition and tenure, internal organisation and work habits, and even basic jurisdiction. For these purposes, we may make a sharp demarcation between the Continental European-type federal court and what, for want of a better term, may be called the Anglo-Saxon stereotype, as existing generally in the United States and in the Commonwealth Countries. In elsewhere seeking to describe and delineate the essential character and work of the Federal Constitutional Court of West Germany, I identified three main elements of Continental European final appellate tribunals that seem to differentiate and distinguish them from the Anglo-Saxon models -- collegiality, anonymity, specialisation. (2) The Continental European court is collegial in the sense that it functions in terms of special chambers or bancs which sit as a whole, and which also decide as a whole and release their final decision in terms of a single opinion, even though that decision

may only be attained by majority vote of the judges. The emphasis, here, is on collective deliberation and collective decision-making, with collective responsibility in the final result. The only remotely proximate Anglo-Saxon analogue to this is, of course, the Privy Council, which also functioned as a collectivity and which always rendered its judgment as a whole, even in the exceptional cases where, -- as we know now, as a happy consequence of ex post facto judicial indiscretions in the years since the decision concerned -- a final result may have been attained only by majority, and even by a bare majority of one. It is of interest, in a Canadian context, to note that a proposal made in 1953 by the distinguished French-speaking jurist who was then Chief Justice of Canada (Chief Justice Rinfret), that the Canadian Supreme Court should "follow the Privy Council practice" and issue only a single per curiam opinion in each case, attracted little or no support, in either French-speaking or English-speaking Canada, and lapsed rather ignominiously. The proliferation of opinion-writing, both dissenting and also specially concurring opinions, continues unabated on the Supreme Court of Canada; and in some respects -- the absence, in particular, of an official Opinion of Court representing the lowest common denominator of majority opinions -- the judicial disunity or simple lack of group cohesion is even more marked than in the case of the United States Supreme Court.

As a second point, the Continental European court is anonymous. This means, not merely that the single, collective, opinion remains unsigned by its main judicial author or authors,

in differentiation even from the Privy Council; not merely that there is no public record of dissents or disagreements or even qualifications to the seeming unanimity and apparent self-evidentness of the final published opinion of the court. It also means that the judges are, in general, strangers to the public; they are normally not identified in political debate; and they are able, in principle, to stay aloof from the exigent here-and-now of partisan controversy. Recognising the practical inevitability -- in so far as great constitutional cases are almost always also great political causes celebres, - that the Continental judges will increasingly be drawn into the public spotlight as their roster of cases expands, one can foresee a certain "Americanisation" of the Continental judicial folk-ways and personality as a by-product of the Continental adoption or extension of the American institution of judicial review. This is already, I think, noticeable in the case of the West German Federal Constitutional Court whose judges have, after some major political cases of recent years, become the subjects of learned newspaper editorials and even of extended judicial "profiles" in the weekly reviews. It is not necessarily harmful, provided the judges do not hesitate to canvass openly, in the court opinions, the policy bases of the courts decision in the instant case, so that the decision and its policy bases can be submitted to the democratic corrective of public discussion and criticism. It is further possible that the increasing focus of public attention on the court and its official policies may lead eventually to some break in the monolithic image of a collegial body united as one behind any single decision of

the court: wise judicial policy-making in great political causes celebres seems to require wide canvassing of the various policy alternatives in any given problem-situation, and this seems to point inevitably to the practical merits, in the more efficient conduct of the court's work, in permitting public announcement of the court's vote in any case and also publication, within reason, of the grounds for any minority position or positions within the court.

As a third point, the Continental European court is a specialised tribunal -- specialised, that is, both in terms of its jurisdiction and also in terms of its judiciary. Most Canadian lawyers should be familiar with the tripartite nature of final appellate court organisation in France -- the Cour de Cassation, the Conseil d'Etat, and the Tribunal des Conflits, -- with even a fourth, perhaps more appropriately styled quasi-judicial, authority in the form of the Conseil Constitutionnel established in the Fifth Republican Constitution of 1958. It may come as a greater surprise to learn that there are no less than six distinct and separate, final appellate tribunals actively functioning in West Germany, specialised respectively in terms of the Civil Law (including Criminal Law), Administrative Law, Finance Law, Labour Law, Social Law, and Constitutional Law: with a further provision, under the Bonn Constitution of 1949, which so far has not been acted upon, for creation of still another Supreme Court, an Oberstes Bundesgericht, charged with the duty of preserving the unity of the law of the Federal Republic. This degree of court specialisation is accentuated still further, if it be remembered that a number of these West German final appellate tribunals are multi-chamber tribunals,

with their internal sections still further specialized in terms of subject matter. Yet it cannot be said that in Continental Europe, deference to judicial expertise, as manifested especially in the proliferation of Supreme Courts that are specialized in terms of subject matter, has been productive of any especial confusion or overlapping of jurisdiction as between the different courts, or for that matter any consequent inconvenience to the general public. Indeed, judging by the experience of both France and West Germany, it seems that the general public tend to prefer the relative expeditiousness and clarity and simplicity, and also the relative financial cheapness, of procedures in the newer public law jurisdictions, in comparison to the cumbersomeness and delays and also the expense of the older or regular, basically civil law, jurisdictions. And it must never be forgotten, in the English-speaking, Common Law world, that the United States Supreme Court, since the practical reforms effected by the Judiciary Act of 1925, with the extensive discretionary control over its own jurisdiction that that gave the court itself, has been to all intents and purposes converted, as a matter of law-in-action, into a specialist public law, indeed constitutional law, tribunal, -- a fact that is amply reflected in practice as to presidential nomination of judges to the court, with the markedly increased emphasis on "men of affairs" who are experienced in handling large policy issues, at the expense of more narrowly technical lawyers.

It would be a mistake, in Canada, to have too rigid or too static a view of the jurisdiction and basic structure and internal organization of the Supreme Court of Canada. For there seems to be much, in the practical workings and operation of the Court as at presently constituted, that could be rationalized, or improved on, in significant ways. The Court suffers, I think, from its lack of specialization, and of specialist expertise among its members. The closely successive retirements of Mr. Justice Kellock and Mr. Justice Rand left a significant gap in the Court's ranks as to constitutional jurists, of whatever philosophy, that has still not been adequately filled. And since the departure of Chief Justice Duff, the Court has probably not had a good Conflicts of Laws man: the extraordinary failure, in Canada in contrast to some other federal systems, to develop a sophisticated body of inter-Provincial, or federal, Conflicts of Laws rules, to enable the resolution and accommodation of competing decisions or statutes from the different Provinces and not least, perhaps also, to harmonize the law of the Common Law Provinces with the Civil Law of the Province of Quebec, becomes understandable, if not yet excusable, in this light. As for the private law itself, one may sympathize with the complaint of our French-speaking colleagues that the Court, as at present constituted under the Supreme Court Act of 1949, -- with only three of its nine judges coming from Quebec, and with one of these three, (Mr. Justice Abbott), being ethnic-culturally an "Anglo-Saxon",

even if a Civilian by legal training -- is hardly equipped to do justice to the interpretation of the Quebec Civil Code in appeals from Quebec Courts.

This emphasis on the numerical composition of voting majorities on the Court, and the underlying political significance of the concretisation, in statutory form, of the principle of regional representation on the Court, is, of course, a recognition of the "cultural aspect" of laws and legal codes in general. It is true that, in the past, there have been the politically unfortunate incidents of occasional decisions rendered by the Supreme Court of Canada, on the Quebec Civil Code, where the Common Law judges have in fact imposed the final judgment, by sheer weight of numbers, upon their Civil Law brethren, who have thereby been left to the scarcely adequate satisfaction of filing dissenting opinions. For gaucheries such as these, committed by Common Law majorities, there may be little or no excuse. Nevertheless it seems only fair to say that such occasions, in private law cases, have not been too frequent over the years; that they have (fortunately) generally not appeared to have worked any substantive injustice in their end result; and that, in any case, such occasions appear hardly to have arisen at all since the Supreme Court of Canada became a final appellate tribunal in its own right, with the abolition of the appeal from Canadian courts to the Privy Council, in 1949. One further comment which also seems not inapposite is that the Quebec judges on the Court have hardly,

in modern times, been in the tradition of the earlier great Civilian jurists. If the full intellectual richness of the Civil Law and its inherent capacity for growth and progressive expansion to meet changing societal conditions, is hardly captured in the contemporary decisions of the Supreme Court of Canada on the Quebec Civil Code, then the fault seems as much, if not more, that of the Quebec Civil Law judges on the court, as of the Common Law majority. Whatever else they may have been in the overall development of Canadian jurisprudence, the Quebec judges have certainly not been, in recent years, distinctive spokesmen, or champions, of the Quebec Civil Code. Perhaps the fairest comment would be that in an era where claims of legal expertise depend so much on legal specialization, three judges are hardly enough to ensure that at any one period there will be at least one or two great Civilians on the court.

On all these considerations, the claims for a strengthening of the quality of Canadian jurisprudence on the Civil Law seem incontestable. While a case could be made for following, in Canada, the American patterns of jurisdiction of leaving all private law matters to the various State Supreme Courts as final appellate tribunals, -- which would mean, in regard to the Quebec Civil Code, making the decisions of the Quebec judicial hierarchy final and unreviewable by the Supreme Court of Canada -- I am not at all convinced that that is either necessary or desirable. The same result could be achieved as easily and with far less disturbance of existing

court machinery, by accepting the principle of specialist chambers within the Supreme Court of Canada, with among these, certainly, a specialist Civil Law chamber with jurisdiction over the Quebec Civil Code (so far as, at the same time, constitutional, civil rights issues be not involved). I take it that the numbers of judges on the Supreme Court of Canada might need to be increased to allow for the efficient operation of a plural chamber system within the court; and if the membership of the Civil Law chamber should, in this way, be drawn from a panel of five to seven, or even nine, judges then I would also hope that, following French practice as between the Cour de Cassation and the Conseil d'Etat, at least one member of the Civil Law panel would be a Common Lawyer to maintain opportunities for cross-fertilization as between the two legal systems. I take it, in any case, that with a plural chamber system within the framework of the one court, there would inevitably be some intellectual give-and-take and exchange of ideas between the different chambers and consequently the specialized branches of law for which they should have competence.

If the idea of jurisdictional specialization, within the Supreme Court of Canada, be accepted in regard to the Quebec Civil Code, then there is no good reason, in principle, why it could not also be extended to other branches of law, for example the Common Law and Constitutional Law, for which specialist chambers within the Court might be created. There should be no especial problems in regard to creation and com-

position of any specialist Common Law Chamber. There might be some questions, however, in regard to the matter of voting rights within any specialist Constitutional Law Chamber.

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For the main burthen of the current Quebec complaints concerning the Supreme Court of Canada, as at present constituted, seems really to be directed to its record of constitutional law decisions in cases originally arising from Quebec -- what we, in the Common Law provinces, have, perhaps inelegantly, been accustomed to categorize as the "great civil liberties decisions of the 1950's". Certainly, if one looks at the actual judicial voting records in those constitutional cases of the 1950's., one finds, in general, the court decisively split as between its Common Law judges and its French-speaking, Civil Law judges.

The voting splits in these cases should not, of course, be overstated or exaggerated. An occasional Common Law judge of high technical legal skills will join the French-speaking judges in dissenting in certain cases from the Common Law majority. And not infrequently the politically decisive majority opinion, among the Common Law judges, will be a consciously modest, fact-oriented opinion, which seems intended to narrow the elements of division and conflict, as between the Civil Law and the Common Law judges, and which, in any case, avoids basing its final holding on high, and necessarily (in ethnic-cultural terms) controversial, issues of policy in public law.

Yet, by and large, the court has split along ethnic-cultural lines in this group of constitutional causes celebres, and the ethnic-cultural nature of the division is accentuated if we note that one of the three Quebec judges, Mr. Justice Abbott, though a Civil Lawyer by training, inevitably sides with his Common Law, "Anglo-Saxon", judicial brethren in these cases. That the split has not been healed with the changes in judicial personnel on the court in the years since the last of these great constitutional decisions in 1959 -- the changes in personnel, in particular, consequent on the retirement of Justices Rand and Kellock, the two most libertarian-activist of the English-speaking judges of modern times, and consequent also on the death of Chief Justice Kerwin, -- seems amply indicated by the judicial voting line-up in the "Lady Chatterly's Lover" case in 1962, where, once again, the court split decisively along general ethnic-cultural lines, with the two French-speaking judges' opinions being notable for the uninhibitedness of their condemnation of the asserted interests in free speech and free literary expression necessarily advanced or favoured in the majority judicial opinions.

If the Common Law judges and the Civil Law judges represented in these cases are to be considered as in any sense "representative" of their different ethnic-cultural traditions with their distinctive value systems and value preferences, it is evident that we have two quite separate, and in many important

respects conflicting, Weltanschauungen,operating in Canada at the present day. For the Common Law judges, responding to the "Open Society" values of an essentially commercial, expanding industrial, civilization, have viewed the community interventions on the part of the Quebec government or of Quebec municipal or other public authorities, in the great public law cases of the 1950's, as unwarranted and intolerable infringements on fundamental liberties of the citizen, of the sort that no liberal democratic society can afford to tolerate. On the other hand the Quebec judges, responding to a society which the Tremblay Report identifies as having a special commitment to the "sense of order", in priority, or hierarchical superiority, to the "sense of liberty" and the "sense of progress", have tended to regard these cases as either not raising civil liberties issues at all, or else, if they do concern civil liberties, to concern, more basically, a "civil liberty" of the Quebec population not to be exposed to the aggressive proselytising activities of the Jehovah's Witnesses or to the potentially corrupting influences of avant-garde literature or of radical political ideas. The semantic play involved in posing the issues that divide the French-speaking and the English-speaking judges, in this way, directs attention to the fact that in a clear contest between interests in speech and communication on the one hand and interests in order on the other, the French-speaking judges on the court have come down unmistakeably on the side of the interests in order and the English-speaking judges on the side of the speech and communication interests.

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No amount of learned discussion of the need for changes within the Supreme Court of Canada, or of learned reference to and footnoting of Continental European or other experience, should be allowed to obscure the question whether what is being contended for is a simple structural change within the court intended to improve its technical efficiency of working operation; or whether the proposals are designed, really, to effect a fundamental change in effective political power as to determination of basic constitutional values within the country. In the latter case, the proposals for change may well prove to be politically unacceptable to a majority of the country.

It is one thing to propose a specialist, Civil Law-composed chamber of the Supreme Court of Canada with final powers of disposition of private law cases arising under the Quebec Civil Code. But should the jurisdiction of any such specialist, Civil Law-composed, chamber necessarily include also public law cases arising interstitially to the Quebec Civil Code, as the Roncarelli case in 1959 in fact did? Again it is one thing to argue the case, on the model of the West German Federal Constitutional Court, for a specialist constitutional law chamber of the Supreme Court of Canada, or even for an entirely separate and autonomous constitutional supreme court; but it is surely no necessary element of any such court specialization to provide for equal representation on the court, in terms of judges and of judicial voting rights, of both French-speaking and English-speaking Canada, as some Quebec lawyers now contend.

Arguments for changes in the political balance of power presently existing within Canada should be presented and argued as such, frankly and openly. The fundamental issue for English-speaking Canada, if the debate be focussed on the public law cases of the 1950's and on an asserted long-standing grievance of Quebec over the Common Law majority-imposed decisions in those cases, may be whether one can have two radically different conceptions of constitutionalism and constitutional liberties operating within a single country and still have a viable federal system. The answer, until very recent years, when one had focussed predominantly on essentially municipal law problems, such as the possible modes of institutionally effectuating any re-united Germany of the future, granted the existence today of a West Germany and an East Germany operating officially from quite opposing philosophical premises, had tended to be in the negative. Now, after some greater experience, in the international law arena, in the practical possibilities for minimum accommodation of contending political and social systems, -- as reflected, happily, in the working Soviet-Western <u>detente</u> of the last several years, -- one tends to be far less pessimistic as to the opportunities, long-range, for fundamental reconciliation and synthesis between different or even opposing value systems. The prime lesson, from these international arenas, is that Co-existence may be both politically practicable, and also reciprocally beneficial and useful, granted a sufficiency of good-will and common sense on both sides!

A fundamental issue today for French-speaking Canada may be, however, whether the ideals of Quebec's great intellectual and spiritual revolution of the last few years are, in the end, really compatible with governmental and official practices of the type manifested in the great public law cases arising from Quebec during the 1950's, at the height of Premier Duplessis' power -- that is to say, an apparent official licensing of a systematic police harassment of an unpopular minority sect like the Jehovah's Witnesses. The invariably conservative and order-oriented, -- at times seemingly reactionary -- face that Quebec has in the past presented to the rest of Canada may be something that Quebec jurists themselves have a special responsibility for overcoming, if the best ideals of the Lesage Revolution are really to be achieved and realized in practical governmental and constitutional form.

Footnotes

(1) As to federal constitutionalism and the role of Supreme Courts, see generally Studies in Federalism (Robert R. Bowie and Carl J. Friedrich, Editors, 1954). And see, also my studies, Comparative Federalism, States Rights' and National Power (1st ed., 1962; 2nd ed., 1965); Judicial Review in the English-Speaking World. (1st ed., 1956; 3rd ed., 1965).

(2) As to judicial review in West Germany, see generally my study, Constitutionalism in Germany and the Federal Constitutional Court (1962).

Memorandum On The Associate States

by Dr. Eugene Forsey

November, 1966.

Memorandum On The Associate States

The nearest thing to specific proposals for this sort of solution to our constitutional problems is the memorandum of the Saint-Jean-Baptiste Society of Montreal to the Quebec Legislature's Committee on the Constitution, May 15, 1964.

The present Canada would disappear. It would give place to two nations, "English Canada" and "Quebec," each embodied in a sovereign "National State;" and the two would "associate themselves" to form "the Canadian Confederation."

"English Canada" would be composed of "the English-Canadian provinces." The repetition of the word "English" throughout the document, and the total ignoring of the French-speaking minorities in the "English" provinces, are noteworthy. There is not one syllable about any provision for their rights. On the contrary, there is the explicit statement that "The Associated State of Quebec and the Associated State of English Canada, including its several provinces," would each "decide on its official language or languages." Moreover, while there is provision for a Bill of Rights in Quebec, there is nothing about a Bill of Rights either in "English Canada" or in the "Confederation" as a whole. And, as if to drive the point home, "English Canada's" opposite number would be not "French Canada" but "Quebec".

Having made it plain that the "National State" of the nine provinces would be thoroughly, totally, "English," the

Society might have been expected to leave that National State's Constitution to be determined by the people concerned. But it does not. Instead, it lays down firmly that "the English-Canadian provinces will continue to form a federation," and that this federation's Constitution "will recognize the delegation of powers between Ottawa and the provincial governments." It graciously concedes that "the number of the provinces of the English-Canadian "federation" could be "reduced." It says the "English-Canadian nation" would have "freedom to give its national government all the powers necessary to discharge the responsibilities" which that nation "thinks fit to confer on it." But apparently the "English-Canadian nation" would not be allowed to set up a unitary state.

The other "sovereign state" would be "Quebec", which, if its electors, by referendum, so decided, would be a republic. The President would be elected by "all the members of the Quebec Parliament" plus an equal number of "grand presidential electors chosen by the municipal councils." The President would "sign all the laws adopted by the Quebec Parliament," which would be made up of a "Chamber of Deputies and a Chamber of Councillors," both "elected by the people."

Each "National State" would, "in principle," have "all the powers of a sovereign state." In practice, their sovereignty would be "limited" in two ways.

First, "certain powers" (not specified) would be "exercised jointly by the governments of the Associated States in virtue...of a treaty concluded between the two States," which

would be "revised every five years." What this means, there is not one word to explain.

Second, certain other powers would be given by the two States to the "Confederation," under the "Confederal" Constitution.

The Confederation would have a unicameral Legislature to be known as the "Confederal Chamber." The National Government of each State would "itself determine the method of election and the term of office" of its representatives in the Confederal Chamber, and "their electoral districts." This last seems to imply that the members of the Chamber would have to be directly elected, and could not be chosen either by the National Parliament of either State or, in the case of "English Canada," by the provincial legislatures.

No law could be passed by the Confederal Chamber unless it secured a majority of the representatives from each Associated State.

And on what matters could the Chamber legislate? Total silence. The explanation seems to be that the real power in the Confederation would reside not in its Legislature but in its Executive, the "Supreme Council of the Confederation."

This "Supreme Council" would be made up of "the Governments of each Associated State." Each Government could "delegate an equal number of Ministers to this Council," which would be chaired, turn and turn about, "by the Prime Minister of each Associated State."

The Supreme Council would "direct the foreign policy of the Confederation." Nothing is said about what "foreign policy" would in fact include: an astonishing omission, in view of the very sweeping claims advanced for Quebec in this field even under the present Constitution (notably by M. Gerin-Lajoie in his celebrated speech to the Montreal Consular Corps in April, 1965).

The Supreme Council would also "have the responsibility of supervising the execution of laws passed by the Confederal Chamber" (on the totally unspecified subjects on which it would be empowered to legislate); of appointing the Confederal civil servants; and of "establishing a close co-operation between the two Associated States in the fields where they have common interests: economic planning, monetary policy, customs, financing of the Confederal administration, continental transport, etc."

Apparently, economic planning, monetary policy, customs tariffs, financing of the Confederal administration, continental transport and whatever may be covered by the majestic sweep of that "etc.," would not be dealt with by the Confederal Chamber but by arrangements arrived at between the two sets of Ministers.

The Supreme Council would also "create the Confederal Court to hear all cases to which the two Associated States were directly or indirectly parties." This High Court would have two annual sessions: one in the capital of the "English-Canadian Federal State" (note, once more, "English-Canadian and "federal"), "the other in the capital of the State of Quebec."

In view of the numerous demands from Quebec that the Supreme Court of Canada ought to be provided for in the Constitution itself, not by a mere Act of the central Parliament, it is surprising that the Saint-Jean-Baptiste Society is prepared to leave the constitution of the Confederal Court to a mere decision of the Confederal Executive. One would have thought that if the matter was not to be dealt with in the Confederal Constitution itself, at least it would be entrusted to the Confederal Chamber.

It is difficult to resist the conclusion that the Chamber's functions can be summed up in Flecker's lines:

"Give all thy days to dreaming,
"And all thy nights to sleep.
"Let not ambition's tiger
"Devour contentment's sheep."

This is perhaps just as well, since it is equally difficult to resist the conclusion that the number of laws which would get the required double majority would approach zero.

How would the Supreme Council itself arrive at its decisions? Silence again; but one can scarcely doubt that, as in the Confederal Chamber (if it ever had a chance to pronounce on anything), any decision would require a double majority. Given the principle of collective responsibility of each of the two Cabinets, this would in fact mean that nothing could be done except by unanimous vote.

"French and English" would be "the two official and obligatory languages of the Confederal State in all its organisms and in the exercise of all its legislative, executive and judicial powers." One would be grateful for some precision here, but none is forthcoming.

"The assets and liabilities of the Canadian State," says the Society, would be "divided between the State of Quebec and the National State of English Canada in proportion to their respective populations, allowing for the federal property actually situated on Quebec territory which would of course fall to the State of Quebec. This latter would thereafter transfer to the Confederal administration the properties deemed necessary for its proper functioning."

There are two ambiguities here.

First, who would do the "deeming"? The State of Quebec? Or the Confederation?

Second, what is meant by "allowing for the federal property situated on Quebec territory"? Does this mean that Quebec would get all such property, and that the remaining assets of the Dominion of Canada would be divided between the two Associated States in proportion to population? Or does it mean that all the assets would be divided in proportion to population, Quebec's share to include all those actually situated on Quebec soil? It sounds remarkably like the former.

Finally, there would be a procedure for amendment, "protecting the freedom of each Associated State." What this means is anybody's guess.

"This," said Hurrell Froude at the end of his biography of St. Neot, "is all that is known to men of the life of the Blessed St. Neot, but not more than is known to the angels in Heaven." What has just been outlined is all that is known to men of the Saint-Jean-Baptiste Society's proposal for a Canadian Confederation of two Associated States; and the angels in Heaven are not available for our further enlightenment. The Society itself seems to have suspected that some people might want something rather more precise; but all it offers for their satisfaction is a couple of final paragraphs which dispose of all the real problems by an airy: "We leave to the experts in constitutional law, economics and political science the task of drafting the Constitution of the Associated State of Quebec and of the Canadian Confederation. We have simply set forth the principles which should guide the authors of this Constitution, and described rapidly the principal institutions to which they will give birth."

It is difficult to believe that the other nine provinces will ever agree to buy such a very large pig in such a very thick black poke. If they did, they would almost certainly find, when they opened the poke, that the pig was paralyzed. If any such proposals are brought forward, either in a Dominion-provincial Conference or anywhere else, the representatives of the other nine provinces should insist on very precise explanations on every one of the "principles" they are asked to subscribe to, and on the functioning of every one of the "principal institutions to which they would give birth." The

"experts in constitutional law, economics and political science" should be called upon to stand and deliver. Only when they have done so will the Governments of the nine provinces, and their people, not to mention the people of Quebec, be in any position to say whether they will accept such a scheme. The prospects of the nine provinces doing so are, in my judgement, virtually nil; so are the prospects that, if they did by any chance go into the thing, they would stay in it for any period much longer than half an hour. But, whether or no, their Governments, and the Government and people of Canada, must know exactly what it is they are being asked to accept. The great danger is that, in a mood of saccharine amiability, the Governments will shut their eyes, open their mouths, and swallow, and Canada will die.